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IMPERSONAL TAXATION

A discussion of some rights and wrongs of Governmental Revenue

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QUIS CUSTODIET IPSOS CUSTODES NISI IUSTITIA ?

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FOREWORD

The question of governmental revenue is not only important in itself, but has an added importance in a country professing to be actuated by a devotion to human rights and personal freedom, lest the government may violate the very right which it professes to maintain. This importance must be the excuse for the following pages on a well-worn topic. There is no new thing under the sun. Probably most of the thoughts herein contained have been both heretofore and better expressed. In fact, one of the vital ideas of these pages was written six hundred years ago. But just as a worker in mosaic may use the most ancient pebbles to make a new picture, so a writer may use the most ancient thoughts to present his view.

It is in no spirit of dogmatism that these pages are compiled, but rather as an attempt to find some path of consistency, reason, and justice, in a chaotic subject vitally related to the rights of every man; as to which rights an editorial in the Boston *Herald* of June 26, 1906, contained the following suggestive passage:

> Men are coming to think as men rather than as denizens of some particular spot of earth. Views are broadening. The human relation in the world of affairs has a larger meaning than it ever had before. But it does not follow, by any means, that socialism, solidarity, communism, collectivism, or whatever among forty names may be given to the act of mortgaging society to government, is the goal and summit of civilization. Mankind is a very great and wonderful thing, but. after all, it is made up of men. And it is only by the higher development of the individual man that men are led by loftier routes along their march to destiny. The socialists may disdain the individual man, but none the less they must reckon with him. He is the bar to their plans.

From the earliest times the questions of public revenue have furnished the themes for animated discussions and the occasions for bloody and momentous conflicts. In the ancient despotisms its collection was a matter of mere force, but in the middle ages there began to be a gleam of right feeling in the professed relations between princes and their peoples, and in modern times the note of equality has been loudly sounded as the just consideration.

Accordingly, innumerable statutes have been devised to pursue this assumed ideal along ever more rocky paths of apparent human perversity. Yet the creation of equality by statute implies, in the last analysis, quite as much as the ancient régime of force, that the private individual has no rights which collective society ought to recognize, and which, with Herbert Spencer, we may designate under the name of freedom. The following pages contain an attempt to deal with the fundamental rights and wrongs of public revenue on a basis consistent with the professions of a freedom-loving nation, so that we shall not forget the thought which Emerson has uttered on behalf of all:

> For what avail the plow or sail,
> Or land or life, if freedom fail.

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Chapter I

INDUSTRIAL FREEDOM

It is probably true, as President Eliot suggested in an address before one of the labor unions at Boston, that at the present time the passion for personal freedom is less ardent than in the middle of the nineteenth century, but perhaps this cooling of the feelings is not on account of any lessening of the love for real freedom. It may rather be on account of an uncertainty in many minds as to the scope of freedom or a haziness of definition as to what it may or may not include.

To be untrammeled, to be unrestrained, is the first thought of freedom, and this idea of absence of restraint is the starting point of freedom as a general term, but when we come to specific kinds of freedom we find that absence of one kind of restraint does not necessarily imply absence of all kinds of restraint. Thus a man in prison may be free from physical pain, and a man out of prison is nevertheless forbidden to steal; for it is an ancient doctrine that one man's freedom must not encroach on another man's right.

So when we come to consider freedom in an industrial sense we cannot say that it is merely the absence of restraint, but rather the absence of some particular kind of restraint. We prevent a child from playing with fire or dangerous tools and we do not feel that we are invading the child's freedom by so doing. The child is clearly in danger of injuring himself and it is for the child's benefit to be restrained. We seek to prevent the turbulent man from making an assault and battery on his neighbor and we do not feel that we are invading the turbulent man's freedom, but rather that we are protecting the neighbor's freedom. It is for the neighbor's benefit that the turbulent man should be restrained. But when a man is by force and threats restrained from seeking his own best good and driven to labor for another at that other's behest, or is deprived of the fruits of his labor at the option of a master, we have an entirely different situation. This is depriving a man of

the chance to make the best of himself. This is the exercise of a proprietary claim over a human being. This is slavery, and the purpose of it is not for the benefit of the slave, but for the benefit of the master.

We may thus classify restraints under three heads:

1. Restraint for the benefit of the restrained.
2. Restraint for the benefit of another.
3. Restraint for the benefit of the restrainer.

These may be called respectively the tutelary, the protective, and the proprietary dominions.

An example of the first is guardianship. The second appears in the usual processes of the civil and criminal law for the protection of life and property and the punishment of injuries. Either the first class or the second may be unjust and oppressive in a case not reasonably necessary for the protection of some preëxisting right. It is the third which particularly violates freedom, for freedom in an economic sense is the chance to make the best of one's self, and a restraint for the benefit of the restrainer is the exercise of a proprietary interest over a man, which is inherently inconsistent with that man's chance to make the best of himself. It is perfectly true that in a specific case the subject might, if free, choose to do the very work or service required by the master and for no greater compensation, but the wrongfulness of the exercise of a proprietary interest over a man is not in the specific acts of hardship involved, but in taking possession of the man himself. As Dr. Lyman Abbott has expressed it in his "Rights of Man," it is an invasion of personality. It is the perversion of one man's life to the uses of another. "The injustice of slavery did not lie in the fact that the slaves were ill-fed, ill-clothed, or ill-housed. . . . The evil of slavery was not that families were separated. . . . The injustice was not in specific acts of cruelty. . . . The wrong of slavery lay in this: that personality was invaded; the product of the man was taken from him; he had put a part of his life out into the world and he was robbed of it. Whenever and however society does this, it does injustice." ("Rights of Man," page 105.)

The failure to take account of the different classes of restraints perhaps explains the uncertainty in the minds of many as to the rightfulness of freedom in any sense except as a favor conferred which may be withdrawn. A misapprehension of the economic

basis of freedom as an economic means toward an economic end may cause us to deny the existence of a right to freedom in the presence of misapplications of it. Take for a specific instance freedom of contract, or the doctrine that a man has a right to sell his goods or his labor for such compensation as seems good to him. Shall we say that by virtue of freedom of contract he may once for all sell himself into slavery? By no means. Freedom of contract is an economic means toward an economic end. It must be exercised for an economic purpose, but slavery is the contravention of the highest economic purpose, as it destroys the chance of the slave to make the best of himself. We must distinguish, however, between an economic purpose and an adequate return. Freedom of contract implies that a man may exercise his judgment or his sentiment in a trade and may take a totally inadequate compensation in a specific case. He is following an economic purpose in exchanging his goods and labor, even though his judgment may be poor or his sentiments may lead him to give his property away; provided always that he does not go to such an unreasonable extent as to require a guardian. So long as a man is following an economic purpose, freedom of contract is essential to the chance to make the best of himself, even though he may not yet understand how best to use the chance. It may be difficult to say where the economic purpose ends, but beyond that limit freedom of contract ceases to operate and the man may be justly restrained, for his own benefit when he threatens his own rights disastrously, or for the benefit of others whose rights are endangered.[1]

Nevertheless, in applying the restraints of the first and second classes, for the benefit of the restrained or for the benefit of others, we must always be careful that we do not encroach upon the third

[1]The converse of this analysis in its application to the principle of guardianship the present writer discussed in an article on "Child Labor in the United States of America," in the Revue Économique Internationale of Brussels for July, 1906, and described it as the guardianship of persons who for the time being are incompetent to take care of themselves without inflicting on themselves a greater amount of injury than the probable benefits which might come from the experience would justify. The principle of freedom of contract was considered by the present writer, in an essay on "Monetary Problems and Reforms," published in 1897, as the starting point for the development of a healthy monetary system. For an exhaustive study of the developmental treatment of economic subjects the reader is referred to a recent work by Dr. Rudolf Kobatsch, of Vienna, "Internationale Wirtschaftspolitik. Ein Versuch ihrer wissenschaftlichen Erklärung auf Entwicklungsgeschichtlicher Grundlage." Wien, 1907; Manzsche Univ. Buchhandlung.

class, restraints for the benefit of the restrainer, for such a restraint is a violation of freedom, the chance to make the best of one's self. Accordingly, we may say that there is always a strong presumption against governmental action until that action clearly appears to be outside the third class of restraints, lest the organized state may be in the position of restraining, not for the benefit of the restrained nor for the benefit of third persons whose rights are threatened, but merely for the benefit of itself; for although within its own sphere the government must surely govern, yet the organized state is after all only an enlarged and artificial or juridical person, and as such person should be held to the full regard for the rights of others. This presumption against governmental action appears in the English common law as the presumption of innocence in criminal matters. If the English-speaking peoples had never done anything else and never should do anything else except to teach this doctrine of the presumption of innocence, they would nevertheless be entitled to the gratitude of mankind.

But in dealing with governmental restraints we must further distinguish between two kinds of restraints. One is the case in which the state by its own motion or decree assumes for its own benefit to invade the personality of some man or to deprive him arbitrarily of a right which a private person would not be allowed to take away from him. This is the normal type of an attempt to exercise a proprietary interest over him and comes within the condemnation of the general rule. The other case is only apparently similar and arises when the state as the owner of some antecedent property or right seeks to protect that property or right from invasion as it would do for the property of a third person. In this case the state acts for itself, not as itself, but as if it were a third person because of the absence of any stronger power to which it may appeal for the protection of its right, for the state as a large artificial person organized to serve certain legitimate ends is entitled as well as any other person to hold, acquire, and conduct any property or business of public interest, provided the state has means of paying for and a reasonable prospect of using the same successfully. But though as a great artificial person the state is thus endowed with the same rights of acquiring ownership as a natural person, it ought, like a natural person, to observe a scrupulous regard for the rights of others and ought not to claim or exercise any such proprietary interest

as in the hands of a natural person would be an invasion of the rights of another natural person. Accordingly, it ought not to enslave its people or assert proprietary claims over them in economic matters. We may say with Aristotle that man is naturally a political animal, but we need to beware of assuming that, because the formation of political entities is a natural human function for natural human purposes, it involves the abrogation of personal freedom. Rather should we say that the true purpose of making political entities is to promote that freedom, and that governments should exist for the benefit of the people and for the benefit of each and every individual in the people.

It is perhaps by a perception of these distinctions that we may explain the apparent anomaly that the country of Washington and the party of Lincoln feel justified in holding colonies in distant seas and exercising government without the consent of the governed. The belief in liberty may be as great though the confidence in the tools used may be less. The experiment of giving suffrage to the Negro has not been so successful as to inspire the most perfect confidence in the wisdom of giving razors to children. Industrial freedom is not the perfunctory copying of fixed machinery in political matters, however valuable that machinery may be in favorable conditions. A well-managed monarchy may give a nearer approach toward freedom than an ill-managed republic, for although there is a presumption against governmental restraint lest it may be an interference with freedom, yet when once the justness of a project as a field of governmental action is established, then the best results will follow from the most efficient action, and true freedom can never require inefficiency.

These seem like stale thoughts in this age of the world, but it can do no harm to rehearse them at the present day when many seem almost ready to assert that man has no rights at all except such as are graciously conferred on him by an omniscient hydra-headed state, and others are loudly proclaiming by voice and pen and the assassin's bullet that governments have no right to exist at all. We shall be better able to avoid both the one and the other extreme, if we bear in mind the different kinds of restraints, the presumption against governmental action lest a restraint may be an interference with freedom, the position of the state as an enlarged economic person, and the value of efficiency within the proper

public field—always remembering that the assertion of a proprietary interest over a human being, whether by planter, prince, parliament or people, is fundamentally and inherently inconsistent with the chance to make the best of one's self, and is a denial of freedom. It is in this sense that we may say that economics, dealing with wealth or well-being, should be the science of industrial freedom, the science that defines, exemplifies, and conserves that freedom.

Chapter II

FEUDALISM

Sir Frederick Pollock, in his essay, "English Law Before the Norman Conquest" (Appendix to "The Expansion of the Common Law"), describes the condition of Saxon society as follows: "There were sharp distinctions between different conditions of persons, noble, free, and slave. We may talk of 'serfs' if we like, but the Anglo-Saxon 'theow' was much more like a Roman slave than a medieval villein. Not only slaves could be bought and sold, but there was so much regular slave trading that selling men beyond seas had to be specially forbidden.

"Among free men there were two kinds of difference. A man might be a lord having dependents, protecting them and in turn supported by them, and answerable in some measure for their conduct; or he might be a freeman of small estate dependent on a lord. In the tenth century, if not before, every man who was not a lord himself was bound to have a lord on pain of being treated as unworthy of a free man's rights; lordless man was to Anglo-Saxon ears much the same as 'rogue and vagabond' to ours. This widespread relation of lord and man was one of the elements that in due time went to make up feudalism. It was not necessarily associated with any holding of land by the man from the lord, but the association was doubtless already common a long time before the Conquest, and there is every reason to think that the legally uniform class of dependent free men included many varieties of wealth and prosperity. Many were probably no worse off than substantial farmers, and many not much better than slaves."

The essential and fundamental idea in feudalism was a pyramidal arrangement of society from the king down to the lowest rank of the population so that every man of an intermediate grade was subject to some other man of a higher grade and in turn might be entitled to a subjection on the part of some other man of a lower grade, while the king or emperor was subject unto God, and a slave

was at the bottom of all subjection.[2] As a slave was totally bereft of all rights to use and dispose of himself to the best advantage and was in effect an article of property to his master, so every man of intermediate rank was partially bereft of rights to use and dispose of himself to the best advantage and was in effect subjected to the proprietary rights of the rank above him. And so it was, up to the king, who was held to be endowed with his power in trust for his people, and answerable to God alone, unless the king should violate the terms of the trust. For it was supposed that the multitude of interlocking subjections was founded upon and justified by a series of reciprocal protections,—that every man in his partial weakness had sold himself in whole or in part to a stronger for protection, and this supposition was the human justification for the system.

We must not be too ready to condemn feudalism. In an age of force and brutality, when the rightfulness of property in human flesh was scarcely disputed, it was only natural that the partial recognition of personal rights should be qualified by a partial recognition of the proprietary claims of superiors, and it was at least an advance from the dead level of universal subjection in the autocratic Roman Empire that there should be a theoretic human basis for society, that some at least should have a partial freedom rather than that all should have no freedom,—that all should have at least some theoretic rights which even the king ought not to restrain rather than that all should be at the mercy of a universal despotism.

The glory of feudalism was in the fact that it was a step, a blind and staggering step, but yet a step toward freedom. The vice of feudalism was in the fact that it recognized and asserted the rightfulness of a proprietary claim over a man. But feudalism contained the seeds of its own decay. The notion that the king or the government was bound to give protection easily developed into the notion that he or it must give it as a matter of right to all men. It is the function, the very reason, of the government's existence

[2]Bracton, in his monumental work, "Of the Laws and Customs of England," speaks thus of the king (Bk. 1, Ch. 8): "There are also under the king freemen and serfs subject to his power, and every person is under him, and he is under no one, but only under God. He has no peer in his own kingdom, for so he would forfeit the precept, since equal has no power over equal. Likewise much less ought he to have any superior or more powerful person, for so he would be inferior to his own subjects, and inferiors cannot be equal to their superiors. But the king himself ought not to be under man, but under God and under the law, for the law makes the king."

to give protection, not to sell it for base subjection and servitude. It is the right of the rich and the poor alike, in spite of their poverty, and irrespective of their riches. Thus spoke the barons at Runnymede, and King John replied, "We shall sell justice to no man and deny it to none."

What, then, were some of the manifestations of feudalism? First and fundamentally was the idea that every man must have a lord, so that a "lordless man" was almost outside the law. And from this came the name and the ceremony of "homage" by which the subject acknowledged himself as the man of the lord. Then again there was the notion that the lower ranks of society ought in some degree to be tied down to the soil or restricted to some limited district, so that in comparatively modern times in England it was illegal for a working man to seek to better his life by migration,—a doctrine logically dependent on the theory that the superior might justly claim a proprietary right over the inferior,—that by an act of conquest or an act of more or less voluntary homage countless generations might be doomed or sold into partial or complete slavery. On this same proprietary theory rests also the doctrine of perpetual and interminable allegiance. These are some of the personal manifestations of feudalism. But although the feudal relation of lord and man "was not necessarily associated with any holding of land by the man from the lord," yet feudalism, as it name implies, reached its most elaborate and intricate development in connection with land-holdings. How then did feudalism manifest itself as applied to the land?

Blackstone, in his Commentaries (Book 2, Chapter 4), says of the establishment of the feudal system of land tenure, that it originated from the military policy of the northern nations who "poured themselves in vast quantities into all the region of Europe at the declension of the Roman Empire." It was introduced by them "in their respective colonies as the most likely means to secure their new acquisitions; and to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers. These allotments were called *feoda,* feuds, fiefs, or fees; which last appellation, in the northern language, signifies a conditional stipend or reward. Rewards or stipends they evidently were, and the condi-

tion annexed to them was that the possessor should do service faithfully, both at home and in the wars, to him to whom they were given; for which purpose he took the *iuramentum fidelitatis*, or oath of fealty, and in case of the breach of this condition and oath, by not performing the stipulated service or by deserting the lord in battle, the lands were again to revert to him who granted them."

But this was not a mere naked condition from which the landholder could purge himself by surrendering the land at his option. There was by the oath of fealty the bond of personal subjection to the lord, and Blackstone tells us that in addition to the oath of *fealty*, "or profession of faith to the lord, which was the parent of our oath of allegiance," the tenant must also do homage, by which "openly and humbly kneeling" before the lord, the tenant professed that "he did become his *man*, from that day forth, of life and limb and earthly honor." Bracton, in speaking of homage (Book 2, Chapter 35, Section 2) says, "Likewise homage is contracted with the good will of each, of the lord as well as of the tenant, and through the contrary will of each is it dissolved, if each has wished, because nothing is so agreeable to natural equity than that everything should be loosed by that principle by which it is bound (*unumquodque dissolvi eo ligamine quo ligatum est*). For it does not suffice if only one has wished this." And in regard to the tenant who disavows his service to his lord, Bracton says a little later, "And the lord in this case is entitled to two remedies, as it seems, either that he should claim the tenement of his tenant, which he ought to hold of him in domain, because he is disavowed by the tenant, in whose person the obligation fails, or that he should claim the service, on the ground that the obligation holds good in his person, and should remit of grace to the tenant the tenement." After the homage of the tenant, Blackstone continues, "The next consideration was concerning the service, which, as such, he was bound to render in recompense for the land that he held. This, in pure, proper, and original feuds, was only twofold; to follow or do *suit* to the lord in his courts in time of peace, and in his armies or warlike retinue when necessity called him to the field." This was the original military tenure of feuds, which, "as they were gratuitous, so also they were precarious, and held at the will of the lord who was then the sole judge whether the vassal performed his services faithfully." In time the custom arose to bestow the feud of a dead

vassal upon a male heir who could perform the services, and later the feuds were granted to a man and his heirs. "But the heir when admitted to the feud which his ancestor possessed generally used to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud, which was called a relief," because it *raised up* and "reëstablished the *inheritance.*"

From the original nature of the military tenure it followed "that the feudatory could not aliene or dispose of his feud, neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord." The feudatories, however, early developed the practice of subinfeudation, by which parts of a feud were divided up among inferior tenants under services to the holder of the larger feud. "But this at the same time demolished the ancient simplicity of feuds, and an inroad being once made upon their constitution, it subjected them, in course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession, which were held no longer sacred when the feuds themselves no longer continued to be purely military." In closing Chapter 4 Blackstone describes the character of the development of the feudal tenure in the following manner: "But as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtility of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject: in pursance of which the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defense."

Blackstone (Book 2, Chapter 5), in discussing the varieties of English tenure, classifies the feudal services into *free services,* or such as in a military age might be supposed to be assumed voluntarily in the first place, and *base services.* "Free services were such as were not unbecoming the character of a soldier or a freeman to perform, as to serve under his lord in the wars, to pay a sum of money, and the like. Base services were such as were only fit for peasants or persons of a servile rank, as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employ-

ments." Both free and base services were, as to amount, further divided into certain and uncertain, and by the combination of these elements, on the authority of Bracton, he gives four main kinds of tenure, two in freehold and two in villenage. Of the freehold tenures, one class was "where the service was *free* but *uncertain,* as military service with homage"; this was the military tenure or tenure by knight service. The other class of freehold was "where the service was not only *free* but also *certain,* as by fealty only, or by rent and fealty"; and this was called free socage.

The more honorable, as it was esteemed, and also the more burdensome species of freehold tenure was the tenure of knight service, which drew unto itself seven great burdens or consequences by the gradual encroachments of the lords and their interpretations of the feudal service. These burdens were: aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat.

1. *Aids* were principally three; first to ransom the lord's person, if taken prisoner; second, to contribute funds to make the lord's eldest son a knight; third, to raise a marriage portion for the lord's eldest daughter.

2. *Relief* was "incident to every feodal tenure, by way of fine or composition with the lord for taking up the estate," after the death of a tenant, "thereby in effect obliging every heir to new-purchase or *redeem* his land."

3. *Primer seisin* was an additional relief payable by the king's tenants in chief and not by those who held of inferior lords.

4. *Wardship* took the place of relief and primer seisin if the ward was a minor. By wardship the lord had the profits of the land and the custody of the minor during the minority, and on coming of age the ward must pay a fine for the possession of the land.

5. *Marriage* was the right to receive a commission for negotiating a marriage of the ward, even if the ward refused the alliance.

6. *Fines for alienation* were payments to the lord "whenever the tenant had occasion to make over his land to another," but only by the king's tenants in chief.

7. *Escheat* was "the determination of the tenure" if the tenant "died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony." The land then "fell back to the lord of the fee."

In view of the large degree in which these burdens depended on asserting a proprietary claim over the body or personal services of the tenant by virtue of the feudal bond of personal subjection to a superior, the term "freehold" seems almost a mockery, and must be taken as referring not so much to the condition of the holding as to the supposed voluntariness of its establishment. The services of the military tenure, says Blackstone, "were all personal and uncertain as to their quantity or duration.. But the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it." This payment was called *scutage* in English, or *escuage* in Norman French. "Hence, we find in our ancient histories that, from this period, when our kings went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops: and these assessments, in the time of Henry II, seem to have been made arbitrarily and at the king's pleasure." This became a great abuse which parliament many times sought to remedy. "Hence it is held in our old books, that escuage or scutage could not be levied but by consent of parliament; such scutages being indeed the groundwork of all succeeding subsidies, and the land-tax of later times."[3]

Blackstone further observes "that by the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feodal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights and gentlemen, bound by their interest, their honor, and their oaths, to defend their king and country, the whole of this system of tenures now tended to nothing but a wretched means of raising money to pay an army of occasional mercenaries. In the meantime the families of all our nobility and gentry groaned under the intolerable burthens which (in consequence of the fiction

[3]Kenelm Edward Digby, in his treatise, "An Introduction to the History of the Law of Real Property," Oxford, 1876, at page 36, says that the service of the military tenure was due to the king direct and not to the immediate lord of the fee, unless the lord himself personally attended the king. Digby says: "This is the distinguishing characteristic between English and Continental feudalism, and was fraught with consequences of the most vital import to the growth of the English Constitution."

adopted after the Conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which, however, were assessed by themselves in parliament, they might be called upon by the king or lord paramount for *aids,* whenever his eldest son was to be knighted, or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of *relief* and *primer seisin;* and, if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith very feelingly complains, when he came to his own, after he was out of *wardship,* his woods decayed, houses fallen down, stock wasted and gone, lands let forth and ploughed to be barren, to make amends he was yet to pay half a year's profits as a fine for suing out his livery; and also the price or value of his *marriage,* if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value, if he married another woman. Add to this, the untimely and expensive honor of *knighthood,* to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *license* of *alienation.*"

"A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of her freedom." But in spite of palliatives from time to time it was not till 1660, in the reign of Charles II, that a remedy was reached in a statute by which, with certain trifling exceptions, "the military tenures, with all their heavy appendages, were destroyed at one blow, and turned into free and common socage," which was the second species of freehold, and may be called the civil tenure as distinguished from the military tenure. A similar reform was acomplished in Scotland in the reign of George II.

"Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our ancient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious or uncertain." (Blackstone, Book 2, Chapter 6.) But socage was feudal, as Blackstone shows by comparing its incidents with those

of knight-service. Both tenures were held of superior lords, of the king as lord paramount, or of an intermediate lord or subject-superior, who was at once a subject of the king and a superior over his own vassals. Both tenures "were subject to the feodal return, render, rent, or service, of some sort or other," but in socage "it was certain, fixed, and determinate," though often nothing more than fealty. "Both were, from their constitution, universally subject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant." Socage was likewise in some measure subject to those contingent burdens which attached to knight-service, but in a less burdensome degree. Thus socage was subject to *aids* for knighting the son or marrying the eldest daughter. *Relief* was due in socage tenure, if the land was held by a rent in addition to fealty. *Primer seisin* was incident to socage in the case of the king's tenants in chief, and likewise *fines for alienation* in the same case. *Escheat* applied in socage, including generally, except in Kent, escheats for felony. *Wardship* and *marriage,* however, in the sense of knight-service were not applicable in socage. But many of these contingent incidents, or casualties, as the Scottish law called similar burdens, were destroyed for socage tenure by the same statute which abolished military tenure.

The feudal tenure exhibited two general principles: first, the personal bond between the lord and the man or the holding by the tenant of or under a superior; second, the granting of limited interests or estates in the land to the tenant and the retention of a reversionary interest in the lord. From these followed the feudal principle that originally the tenant could not directly aliene his interest in the land, but must surrender it to the lord to have a new grant made to the purchaser, or else he must carve out of his own interest a subsidiary estate to the purchaser. It seems, however, that by the middle of the thirteenth century the power of selling an estate to be held of the same lord of the fee by substitution had already been developed, for Bracton, who wrote at that period, says (Book 2, Chapter 35, Section 12), in discussing homage: "In the same way homage may hold good in the person of the lord conversely, and be dissolved and extinguished in the person of a tenant and revive in the person of another tenant, as, for instance, if a tenant, when he has done homage to his lord, has dismissed himself

altogether from his inheritance and has enfeoffed another to hold of the chief lord, and in which case the tenant is released from his homage and the homage is extinguished, whether the chief lord is willing or not, and it commences in the person of the feoffee, who is bound on account of the tenement which he holds, which is a fief of the chief lord. Likewise the homage, which is then extinguished in the person of the tenant, may be revived again in the person of the same, but from another cause. As if one who has been enfeoffed by him should restore to him the same tenement to be held of the same chief lord."

By the logical development of the feudal law through subinfeudation there was no limit to the theoretic line of subsidiary estates, each carved out of the preceding at each successive sale. Each tenant could subinfeudate his land to be held of himself as a subsidiary or intermediate lord. The result would be very complicated in course of time, and in England the lords of estates complained that through subinfeudation by a tenant they often lost the benefit of the feudal incidents. So in 1290 this general subinfeudation by subjects was terminated by the statute of Westminster the third, from its opening words in Latin called *Quia-Emptores,* which enacted that every freeman might sell his land held in fee simple at his pleasure, but the purchaser should hold it of the same lord of whom the seller held it. This statute was apparently a compulsory adoption of the method of conveyance by substitution, which was already optional, as shown by the above quoted passage from Bracton. It was considered not to apply to the Crown, and several centuries later, in some of the charters of the American colonies, as, for instance, in that of Pennsylvania, the proprietaries were licensed to make subinfeudations. But in general the statute of 1290 may be taken as the turning point of English feudalism. Scotland, however, has retained the principle of subinfeudation under statutory regulations for modern conditions, and thus in that respect the Scottish tenure remains more feudal than the English, although the casualties have been modified and restricted.

We need not assume, however, that the mere succession of a series of estates in the same parcel of land was necessarily an evil, for in modern commercial communities we frequently find large transactions based on mere leaseholds with various degrees of sub-

letting by virtue of special contracts. The feudal estates were not merely successive interests in the land, but successive interests coupled with the personal subjection of the tenant to the lord. This element of personal subjection was the root of all the evils which gradually developed in connection with the feudal tenure. Nevertheless, when the incidents and casualties of the system grew too grievous to be borne the feudal basis of society had become so ingrained in the thoughts of men that instead of abolishing all feudal tenures, the English parliament simply reduced the more burdensome to the milder type, and extended the scope of free and common socage. But socage tenure, as we have seen, involved in theory the personal subjection, for it was considered to arise from and rest upon the feudal idea of fealty, which is described by Chancellor Kent in the following manner:

"Fealty was regarded by the ancient law as the very essence and foundation of the feudal association. It could not on any account be dispensed with, remitted, or discharged, because it was the *vinculum commune,* the bond or cement of the whole feudal policy. Fealty was the same as *fidelitas.* It was an oath of fidelity to the lord; and, to use the words of Littleton, when a freeholder doth fealty to his lord, he shall lay his right hand upon a book, and shall say, 'Know ye this, my lord, that I shall be faithful and true unto you, and faith to you shall bear, for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do at the terms assigned; so help me God and His saints.' This oath of fealty everywhere followed the progress of the feudal system, and created all those interesting ties and obligations between the lord and his vassal, which, in the simplicity of the feudal ages, they considered to be their truest interest and greatest glory." (Kent's Com., Vol. 3, p. 511.)

As to fealty we may observe that although Blackstone says that "the statute of King Charles extirpated the whole and demolished both root and branches" of the military tenures, yet it did not touch the root principle of feudalism, but left intact the theory of feudal subjection and the attendant fealty.

Thus in outline was the old feudal tenure. Chancellor Kent, in considering the general effects of the feudal system, says: "Except in England, it annihilated the popular liberties of every nation in which it prevailed, and it has been the great effort of modern times

to check or subdue its claims, and recover the free enjoyment and independence of allodial estates." (Kent's Com., Vol. 3, p. 501.)

It may assist the discussion of feudalism to consider a comparison of allodial titles therewith in a jurisdiction where both feudal and allodial titles exist to-day side by side. Such a jurisdiction is Scotland, for although the Scottish land tenure for the most part is feudal, and in some respect more feudal than the English, yet there exist in the Orkney and Shetland Islands the remains of an ancient Teutonic allodial land law still vigorously flourishing. A recent Scottish case, Smith *v.* Lerwick Harbour Trustees, in the Court of Session (Fraser's Cases, Vol. 5, p. 680), discusses this comparison.

The case of Smith *v.* Lerwick Harbour Trustees deals with allodial or udal titles in the Shetland Islands in regard to a piece of shore property as to which the court held that the possession proved was not "of such a character as would have been requisite to support a conveyance" thereof "by a subject-superior under feudal titles." The Lord President in his opinion said: "The first important question is whether the tenure of the piece of ground in question was udal or feudal at the time when the disposition . . . was granted. If the tenure was then feudal, the presumption would be that the property in the foreshore down to low-water mark was vested in the Crown, subject to public uses, and that no proprietary right to it could be acquired except by a conveyance following immediately, or mediately, from the Crown. This would result from the view that according to the feudal system, the whole territory of the country was originally vested in property in the sovereign, and that it is consequently incumbent on a subject claiming a proprietary right in the shore to produce a title to it following directly or indirectly from the sovereign." After showing the absence of sufficient possession for prescription, the Lord President continues: "I understand, however, that the parties are agreed that there is no evidence that the foreshore in question had ever come to be held under feudal tenure, and that it remained, so far as proprietary right is concerned, subject to the laws and usages of udal tenure. I think this view is in accordance with the authorities which were referred to, and that the question comes to be, what are the rules and incidents of udal tenure applicable to the circumstances of the case? Now I understand the first of these to be that

the right to the territory of the country is not originally vested in the Crown, but belongs to subjects who can prove that they have had adequate possession of it to establish a right to it apart from written title, or who can show a written title to it after it has come to be the subject of conveyance by written title. Now, as the piece of foreshore in question has been held subject to written and recorded titles, at least, from the year 1819, I think that a progress of titles thus extending to a much longer period than that of prescription is sufficient to establish a valid right of property in the holder of the titles. It may be that the right is subject to certain public uses, such as navigation, passage, and the like, in so far as the ground is below high-water mark, but in so far as the right of property in it is concerned, it seems to me that the titles are, *prima facie,* sufficient to establish a valid right." The allodial title was, therefore, held sufficient.

Lord Kinnear, in his concurring opinion, after considering the effect of enclosing the foreshore and converting it into dry ground, said: "If it be assumed that the Crown has an antecedent right of property in the foreshore, I do not follow the reasoning by which it is supposed that such right of property is lost as soon as the tide ceases to flow over the ground. There are Crown rights, no doubt, affecting the foreshore which may not affect land from which the sea has been effectually shut out, but they are not rights of property, and I cannot admit that a right of property in one part of the *solum* of the country may be lost or acquired by other methods than those which regulate the acquisition or loss of property in any other part. . . . The whole difficulty in this part of the discussion seems to me to arise from a confusion, which, according to Sir Henry Maine, is incidental to the feudal system, between two different things, sovereignty and property in the Crown. But in our law, it is now established, these two ideas are perfectly separate and distinct. It is familiar and elementary doctrine that the Crown, if it has not granted it out, has a right of property in the foreshore which may be alienated, and also a right of sovereignty as guardian of the public interests for navigation, fishing, and other public uses which cannot be alienated. But it is only with the first of these rights that we have any concern in this action. The only question is whether the piece of ground described in the summons is or is not the property of the pursuer;

and a decision in his favor will not in any way interfere with the public uses, the protection of which is an inalienable right of the Crown. I take it to be well settled that in Scotland, where land rights are feudal, when a subject has acquired by Crown grant the absolute property of the seashore, the Crown will 'still retain,' as Lord Moncreiff puts it, . . . 'a supreme title over it for protecting all the rights and purposes of navigation, great or small,' and possibly also for protecting such other public uses as may be established by long possession. We are concerned in this case, therefore, with a question of private right, and with no question of public uses whatever. Nobody has suggested that as regards these the Crown right is not the same in Shetland as on any other part of the seacoast of Scotland. But whatever it be, it will not be prejudiced by anything we decide in this action.

"The whole question, then, seems to me to depend upon whether the rights of property in land in the Shetland Isles is governed by the feudal system, and I cannot see any ground in reason or authority for distinguishing in this respect between the foreshore and the rest of the soil. . . . On the main question, I do not think it possible to doubt that the land law of Shetland is allodial and not feudal. . . . But if the land right is allodial, it is certain that in that system the fundamental doctrine of the feudal system as to the Crown right of property has no place. In the feudal system the king is the original lord of the land, and every right of property in land issues mediately or immediately from him. That is the theoretical basis of our whole system of land rights in Scotland. But the king or overlord has no such radical right of property in allodial land. The right of the private owner is not to hold of and under a superior. His right of property is *dominium* in the sense of the Roman law. The king is sovereign, but he is not the universal landlord."[4]

It appears, therefore, that allodial land may be and in fact is subject to some supreme public uses which exist irrespective of feudal or allodial titles. The legislature may suspend these uses in whole or in part or modify the application of them in special instances, but they cannot be alienated except as an alienation of sovereignty, and an abrogation of them would be in effect to make

[4]For a further discussion of the feudal tenures, see Cadwalader's Treatise on the Law of Ground Rents in Pennsylvania.

each landowner a little king. They are, therefore, legally not property in the sense that they can be transferred, but are held in trust for the public benefit. This appears also in the Chicago Lake Front case (146 U. S. Reports, p. 487) and in the Massachusetts case of Commonwealth *v.* Alger (7 Cushing, p. 53) in regard to public rights of navigation. Their exact limitations may be difficult to determine, but that these public uses must exist appears from the fact that even an allodial title must originate in an "adequate possession," and what that possession shall be and how it shall operate to determine a particular piece of land with definite boundaries must depend upon the artificial rules or customs of the law. The artificial title thus created must be subject to the rules of the artifice by which it exists. We may, however, go further and say that these public uses or sovereignty rights, though not legally property, are yet economically proprietary interests, for they involve and assert a beneficial voice in the disposition or management of the subject matter and, so far as they operate in a particular case, they lessen the field of the beneficial enjoyment of the owner of the land affected. They may be compared with *"servitudes,"* which have been defined as "certain portions or fragments of the right of ownership, separated from the rest, and enjoyed by persons other than the owner of the thing itself." (Hammond's Sanders' Justinian, lib. 2, tit. 2, p. 186.) They may for convenience be called "public servitudes." They are often of greater extent than mere private servitudes, but are economically of an analogous nature in their effect by lessening the usable value of the private property. They are further to be distinguished from mere feudal reversionary rights in that they affect all kinds of land titles, and do not depend upon the personal tie of the feudal relation.

The personal subjection of the feudal tenure or the assertion of a proprietary interest by the superior over the inferior, as the system was at length developed, was the starting point not merely of the harmless though complicated series of reversions and estates, but of the manifold burdens and abuses of the feudal tenure. Although the feudal theory supposed that the tie between lord and man was mutual, so that, as Bracton says, the lord owed as much to the tenant as the tenant to the lord, except in reverence, yet the inevitable tendency of such a relation was toward lessening or ignoring the duties of the lord and changing the position of the

vassal from a supposed voluntary service into a hard and fast legal servitude, a servitude of the person rather than of the thing. Chancellor Kent describes the result when he says (Kent's Com., Vol. 4, p. 443): "The whole feudal establishment proved itself eventually to be inconsistent with a civilized and pacific state of society; and wherever freedom, commerce, and the arts penetrated and shed their benign influence, the feudal fabric was gradually undermined, and all its proud and stately columns were successively prostrated in the dust." To such a pass did a system come which was originally founded upon mutual helpfulness that the history of centuries has been largely, and to some extent still is, occupied with efforts to remove the evils grown therefrom, but if we confine our efforts merely to chance effects and ignore the fundamental cause, we shall in the end merely exchange the graded subjection and qualified freedom of feudalism for the universal and unqualified subjection of the Roman Empire, and the history of ages will stand for naught.

Chapter III

LANDED PROPERTY IN RELATION TO TAXATION

By what justification does a government collect revenue from or on account of the private lands within its jurisdiction? Blackstone (Book 2, Chapter 5) regards the English land tax as derived from the feudal escuage or pecuniary composition for the ancient knight-service in the military tenures. Inasmuch, however, as escuage was one of the ancient burdens abolished in the reign of Charles II by the act reducing military tenures to socage, the land tax cannot be taken as identical with escuage, but rather as a broader resource in substitution therefor.

There was, however, one element in the ancient knight-service strictly analogous to an efficient system of taxation. That element was the uncertainty of amount required from year to year. It was this uncertainty that in feudal conception was considered as giving greater dignity to the military tenure, perhaps as more perfectly identifying the landholder with the interests of the sovereign. On this point of uncertainty Blackstone says: "Since, therefore, escuage differed from knight-service in nothing, but as a compensation differs from actual service, knight-service is frequently confounded with it. . . . But as the actual service was uncertain, and depended upon emergencies, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergencies. For had the escuage been a settled, invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent; and the tenure, instead of knight-service, would have then been of another kind, called socage." (Blackstone, Book 2, Chapter 5.) But as escuage or scutage was chargeable only for lands held in knight-service, it was in itself only a limited resource, and accordingly there were other taxes.

"Of the same nature with scutages upon knights fees were the assessments of hydage upon all other lands, and of talliage upon

cities and burghs. But they all gradually fell into disuse, upon the introduction of subsidies, about the time of King Richard II and King Henry IV. These were a tax, not immediately imposed upon property, but upon persons in respect of their reputed estates." (Blackstone, Book 1, Chapter 8.)

In this last quoted passage Blackstone touches upon the fundamental question of land taxation, for the justification of such taxation must rest either on some relation between the government and the owner of the land on account of the ownership, or on some relation of the government to the land itself.

One theory would be to say, for instance, that the landholder by holding the land brings himself under a personal bond to serve the state with periodic payments of money of uncertain amount. But this is in effect the reassertion of the feudal tenure and would logically exclude the claim of taxation in the case of allodial lands. The Constitution of the State of New York, in Article 1, Sections 10, 11 and 12, declares all land titles in that state to be allodial, while the laws of New York provide for land taxation.

Constitution of New York, adopted September 28, 1894, Article 1, Section 10. The people of this state, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the state; and all lands the title to which shall fail, from a defect of heirs, shall revert or escheat to the people.

Section 11. All feudal tenures of every description, with all their incidents, are declared to be abolished, saving, however, all rents and services certain which at any time heretofore have been lawfully created or reserved.

Section 12. All lands within this state are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates.

The statutes of Connecticut declare for allodial titles in the following provision: "Every proprietor in fee simple of lands has an absolute and direct dominion and property in the same" (General Statutes of Connecticut of 1902, Section 4025). The laws of Connecticut also provide for land taxation. These two states are not peculiar in asserting on the one hand the principle of allodial titles, and on the other hand the claim of taxation. Shall we say

that these two claims are mutually inconsistent? That would be a lame result, and we must declare that the theory of feudal tenure, however it may account for the practices of taxation in a country confessedly or formerly feudal, is not broad enough to serve as a basis for the principles of taxation in a country professedly allodial.

Perhaps some one may urge that the landholder holds his land only in trust to respond to the public claims. But how arises the trust? Is it by the external and self-sufficient decree of the law? Then one voice of the law takes away what another voice declares to be a man's own, and the two voices conflict. Or shall we say that, though the man owns the land, the government owns the man? Then we reach the troublesome result that that government which is entitled to collect a tax for a particular piece of land is not the government where the land lies, but the government where the owner happens to reside or be a citizen. It is needless, however, to show the frequency with which governments assert the claim to taxes for the lands in the jurisdiction regardless of the residence or citizenship of the owner.

We shall avoid all of these difficulties if we can find a fundamental interest in the land as a basis for the claim to taxes therefrom. Land may be described as the raw material of sovereignty, that is, a body of men cannot be called a sovereign state unless it exerts authority over some determinate territory. Therefore, any private interest in land in a civilized community must be concurrent with such public rights as are essential to the existence of the community. Although the right to use land generally may be called a natural right of mankind, yet the private right to the use of any particular piece or portion of land must depend upon the provisions of positive law to identify the boundaries and the corporeal and incorporeal extent of the particular entity to be enjoyed.

It follows that an allodial title is subject to such public rights as the nature and situation of the property naturally imply, for instance, rights of navigation in the case of foreshore property. These public rights by analogy to certain private rights may be called public servitudes, which are economically of a proprietary nature, because although not legally property yet they result in diverting a portion of the proprietary utility from the owner of the land. Now, if the existence of a private land title must rest upon

the positive law of some established political community, and if the existence of the community depends on maintaining jurisdiction over a certain territory, then it is proper to assert that each particular parcel of private land in the territory is charged with a real burden to maintain the government. Such a burden may be classed as a public servitude, or a part of the *ius publicum* as distinguished from the *ius privatum*, a distinction long well recognized in the feudal land law of England. The French Civil Code (Section 637) defines a servitude as "A charge imposed on a heritage for the use and utility of a heritage belonging to another proprietor."[5] If we treat the sovereignty rights of a government throughout its territory as a "heritage" the definition of the code exactly describes the claim of taxation against landed property. Nor is this a novel use of the term. In the case of Samuel G. Cochran against Curtis Guild, in 1870 (106 Mass. 29), the counsel for the defendant, though denying liability under the words of a particular covenant in question, said: "The liability to the lien of taxation is a perpetual servitude which the estate owes to the public, but this liability is not within the meaning of the covenant."

The French code (Section 639) further says that a servitude may result "from the natural situation of the premises." This seems to imply that the nature and character of a particular property may create a servitude over it. The public servitude of taxation arises from the nature and situation of property in land. Whenever, either by grant or by such possession as the law considers sufficient, a particular parcel of land with ascertainable boundaries and appurtenances is individualized from the rest of the surface of the earth as a private heritage, there arises coextensive with it this public servitude of a perpetual nature. If the land afterward comes into public ownership the public servitude is merged, blended, or confused with the public title, for it is needless to assert a right in the nature of a servitude when one has the heritage itself. If again the land is granted in private ownership the public servitude again emerges coextensive with the private right. This is usually expressed in American laws by saying that the lands of the nation, the state or the municipality are "exempt from taxation," but logically it can be nothing more than an indirect

[5] "Une servitude est une charge imposée sur un héritage pour l'usage et l'utilité d'un héritage appartenant à un autre propriétaire."

way of saying that the government in such cases does not need to rely on its general public servitude, but has complete possession by title.

We may, therefore, classify the possible theories of land taxation under two general heads, personal and impersonal; and we may further divide the personal class into two subdivisions. One of these subdivisions would regard the tax as in the nature of a rent-service paid for holding the land either mediately or immediately of the state. This may be called the feudalistic view, by which the ideas of property and jurisdiction are more or less commingled. By this view the king or the state is sovereign because it is the owner of the land or has retained a reversionary estate in the land, so that all private titles to land must, therefore, be held of the state by personal service, and a proprietary claim is asserted over the landholder for the feudal service by virtue of the tenure. The second subdivision of the personal class would treat the tax as the personal duty of a servant to a master, and would regard the private title as distinct from the sovereignty even when granted by the sovereign, but as held in trust by virtue of an implied interest in the state over the person of the owner. This may be called the nationalistic view and seems dependent on some doctrine of personal status or a theory that a man's property rights flow from the status conferred on him by the nation or state of which he is a citizen or subject, so that conversely the state has a proprietary claim over the man. In this view the king or the state is sovereign, not as land owner, but as having a special property in the citizens.

In contradistinction to both of these personal theories the impersonal theory would regard the tax as resting neither on a feudal holding of the land nor a national subjection of the person, but on the existence of a fundamental public interest concurrent with the private title in the land by virtue of the essential nature of landed property. By this view the king or the state is sovereign, not as proprietor of either land or people, but as the instrument of necessary public functions within a specified territory. This view combines elements resembling both of the personal theories, while rejecting each of those theories as a whole. It resembles the feudalistic in that it refers the state to a particular territory. It resembles the nationalistic in that it regards the state as representing a particular community or nation.

These several theories of land taxation are reflected in various methods employed or authorized by the laws of different states for the enforcement or collection of the tax. Thus, under a personal theory, the tax is charged to some particular person, as owner, occupant, or tenant, as the case may be, and is then enforced as a personal liability against that person by the seizure of his goods, the arrest of his body, or by a general action at law. On the other hand, under the impersonal theory, the tax is charged to a particular piece of landed property, as an entity against which the tax lies, and is enforced by the physical seizure of the land or by a symbolical seizure through the taking or sale of the private title by the public authorities in assertion of the public servitude in the land.

The difference between a personal assessment *for* landed property and an impersonal assessment *on* landed property is well set forth in the case of Haight *v.* The Mayor, etc., of the City of New York (99 N. Y. Reports, p. 280), in which the court said: "We are of opinion that in the City of New York it is not essential to the validity of a tax upon land, that the name of the owner should be inserted in the assessment list. The tax may be assessed directly upon the land, properly describing it, and the only effect of omitting to insert the name of the owner or of inserting the name of one who is not the owner, is to deprive the city of the right to collect the tax from the owner personally or by distress of goods and chattels, etc., and to confine its remedy for the collection of the tax to the enforcement of its lien therefor upon the land assessed." The court calls attention to the use of a different method in other parts of the state, in which the inhabitants of each town are assessed for their real estate, "and the inhabitant so taxed is personally liable." The tax thus assessed is declared to be a lien on the land, but "unless land is assessed to the real owner or occupant by his name, the tax is void." In the City of New York, says the court, the name of the owner or occupant was declared by statute not essential to the validity of the tax against the land. The theory of the personal assessment of taxes for lands is stated by the court in the case of Hagner *v.* Hall (10 Appellate Division Reports of N. Y., page 585). "Until the year 1850 the tax in the case of lands of residents could never become a lien on the land. The sole method of enforcing it was from the personal property of the

owner. If the tax of one year was unpaid, it was added to the tax of the next year and attempted to be collected with it out of personal property. Thus taxes in default became cumulative, but not charged on the land. Taxes in the case of lands of non-resident owners were charges on the land and created no personal liability against the owner. In 1850, and afterwards in 1855, the system as to unpaid taxes of residents was changed. When the tax was in default, the next year it is to be levied and returned in the same manner as is the case with lands of non-resident owners. Still, in my opinion, this has not changed the effect of the proceeding. It is essentially a proceeding to create a debt against an individual. The individual is the primary debtor, and the land is only in the nature of surety liable for his default."

The language of the court in the last case quoted in describing the personal method of assessment, as a proceeding to create a debt against a particular individual, shows the true nature of the personal theory as the assertion of a proprietary claim over the owner, for the legal creation of a debt by the spontaneous action of the intending creditor without the special contract or wrongful act of the intended debtor is economically, whatever the law may call it, the assertion of a proprietary claim over a person. It is curious to observe the coexistence of both these theories and methods of enforcement in the same state. New York is not peculiar in this, but the interesting query suggests itself whether the assertion of the personal theory rests on a feudalistic or a nationalistic conception. In view of the distinct declaration of the New York constitution against feudal tenures the maintenance of the personal theory would doubtless at the present time be considered nationalistic, but the practice is clearly a survival from the colonial times and is perhaps or probably derived from the feudalistic conceptions on which the English land law is founded. This is further suggested by the history of assessment for lands in Massachusetts, as described in the case of Richardson *v.* Boston (148 Mass. Reports, page 508).

In that case Judge Holmes said: "By the older statutes, the general remedy for refusal to pay any rate or tax was distress, and, in case of failure to find sufficient chattels for the levy, arrest. It applied to taxes on persons in respect of their land as plainly as to other taxes." The court cites colonial laws of 1672, provincial laws of various years from 1692 to 1757, and state statutes, and

summarizes their effects: "The power to sell real estate appears in Prov. Laws, 1731-32, Chapter 9, as the only available means for collecting taxes upon unimproved lands belonging to non-resident proprietors." . . . "It is then extended to the case of removing owners (St. 1785, Chapter 70, Section 6), and to some cases of taxes assessed to persons in possession, but not owners (Section 15). But the last cited section makes it plain that the remedies by distress and arrest still apply to taxes for land, and are regarded as the general remedies." The "Revised Statutes" of Massachusetts were issued in 1836. In these, the court says, "the lien for taxes on real estate has become general, but again it is made plain that the lien does not exclude the remedies formerly available." The court refers particularly to the section of the law which relates to the land of a non-resident owner and provides that "the collector may, at his election, collect such tax of the said owner, in like manner as in the case of a resident owner, or he may collect the same by the sale of such real estate." The court considers "that the giving of a lien upon real estate did not displace the earlier remedies of distress and arrest," in view of the general wording of the statutes. "We, therefore, are of opinion, as we have said, that owners of real estate, properly taxed for it, are personally liable for the tax."

Thus we see in both these state, New York and Massachusetts, a personal theory of land taxation surviving from colonial times. In each state the theory breaks down in the case of lands of non-resident owners, and is supplemented by a tentative use of an impersonal remedy, which is gradually extended to general application, but without the abandonment of the personal theory. Yet if the impersonal theory is the only satisfactory reliance for the public rights of the state in the last analysis, so also it is entirely sufficient when coupled with effective provisions for its enforcement, and its definite adoption and use should logically exclude any attempt at personal enforcement, for the land is fixed and ascertainable unless washed away in a flood, and there seems no just reason for taxing a man for land which he has lost. The fact that a personal theory is still asserted in spite of the adoption of an impersonal remedy is doubtless due to the persistence of ancient practices, and the fact that the practice of personal enforcement comes down from colonial

times seems to show its essentially feudal origin in the American states.[6]

This feudalistic resemblance appears in the laws of Maine in the Revised Statutes of 1903, Chapter 10, Section 30, by the following provision as to liability for land taxes: "In all suits to collect a tax on real estate, if it appears that at the date of the list on which such tax was made, the record title to the real estate listed was in the defendant, he shall not deny his title thereto: *provided, however,* if any owner of real estate who has conveyed the same, shall forthwith file a copy of the description as given in his deed, with the date thereof and the name and residence of his grantee, in the registry of deeds where such deed should be recorded, he shall be free from any liability under this section."

Compare the foregoing Maine law with the following passage from the Scottish Conveyancing Act of 1874 (Section 4, paragraph 2) in regard to the feu-duty or feudal rent service of Scotland: "Every proprietor who is at the commencement of this act or thereafter shall be duly infeft in the lands shall be deemed and held to be, as at the date of the registration of such infeftment in the appro- private register of sasines, duly entered with the nearest superior whose estate of superiority in such lands would according to the law existing prior to the commencement of this act have been not defeasible at the will of the proprietor so infeft, . . . and provided further, that notwithstanding such implied entry, the proprietor last entered in the lands, and his heirs and representatives, shall continue personally liable to the superior for payment of the whole feu-duties affecting the said lands, and for performance of

[6]Dr. Rudolf Kobatsch, of Vienna, Professor at the Imperial and Royal Consular Academy, in his recent work, "Internationale Wirtschaftspolitik," calls attention to a similar shifting of emphasis from the personal to the impersonal in international commerce, and in a note at page 9 of his book quotes Gustav Schmoller to the following effect: "As the wares in the older time were brought to market by the owner or trader personally, so the permission or prohibition of all foreign competition consisted at that time in the ordinances upon the entrance, the residence, the rights and the trading licenses of foreigners. Slowly, and generally from the sixteenth to the eighteenth century, since there arose independent posts, a great merchant marine, and a commission business, did the system of personal permission to foreigners commercially yield to the system of permission to their goods. The more humane international law then left the stranger generally without thought to enter or leave the civilized states, which then commercially concentrated their efforts on allowing or forbidding the export and import of wares." Dr. Kobatsch's work is an exhaustive discussion for the explanation of international economics upon an evolutionary basis from the starting point of Herbert Spencer's "Social Statics."

the whole obligations of the feu, until notice of the change of ownership of the feu shall have been given to the superior; . . . ." By the strict original feudal conception an estate could not be transferred to a new owner without the consent of the lord of the fee or the superior as he is called in Scotland. The conveyancing act while allowing a voluntary change of ownership holds the previous owner personally for the feudal services until notice is given to the superior. The statute of Maine, as above quoted, recognizes the right of private conveyance, but holds the prior owner for taxes unless notice is given to the public authorities by a record, as if the theory of the tax were feudal service for which some one must be personally bound to the authorities as to a feudal superior.

Such an idea of personal bondage, however, is totally needless with an impersonal conception of the tax as resting on a fundamental public servitude in the land, for such an interest is plenary and needs no auxiliary personal liability. Or if we base it on a nationalistic view the personal liability is not only needless but positively harmful as impliedly limiting the right of the state, as a mere attaching creditor, to the specific interests of particular partial owners, when the property is involved in different degrees of ownership. Nor is a personal theory necessary under the American constitution, for the Supreme Court of the United States has recognized the sufficiency of an impersonal system of land taxes in the case of Witherspoon *v.* Duncan (4 Wallace, page 210). In that case, at page 217, Mr. Justice Davis said: "Arkansas has the right to determine the manner of levying and collecting taxes, and can declare that the particular tract of land shall be chargeable with the taxes, no matter who is the owner, or in whose name it is assessed and advertised, and that an erroneous assessment does not vitiate a sale for taxes."

The exclusive sufficiency of an impersonal theory in analogy to a servitude in the land is further illustrated by the French Civil Code in the following sections having regard to the enjoyment of servitudes:

Section 697. "He to whom is due a servitude has the right to make all the works necessary to use it and to preserve it."

Section 698. "These works are at his costs, and not at those of the proprietor of the premises subjected, unless the title of establishment of the servitude says the contrary."

Section 699. "In the case even where the proprietor of the premises subjected is charged by the title to make at his costs the works necessary for the use or the preservation of the servitude, he can always free himself from the charge, by abandoning the subjected premises to the proprietor of the premises to which the servitude is due."[7]

The public servitude of taxation on land is somewhat analogous to that interest which the English law calls a *"profit à prendre,"* in that it consists in extracting a periodic benefit from the land. In economic effect it amounts to a perpetual mortgage on the premises for fluctuating amounts, or perhaps more exactly a right to create a series of mortgages from time to time. It is true that the usual private mortgage arises in connection with a personal claim, but the charge on the land and the personal claim are two entirely independent resources. There is nothing in the essential nature of the case to prevent the creation or existence of the charge on the land without any personal obligation, and in the vast majority of cases it is to the security of the charge rather than to any personal liability that the mortgagee looks. In the case of Cook *v.* Johnson, in the Supreme Judicial Court of Massachusetts (165 Mass. Reports, at page 247), Judge Morton for the court said: "It is well settled that there may be a mortgage without personal liability on the part of the mortgagor for the debt which the mortgage secures."

It is also possible for a person to purchase mortgaged premises without assuming any personal liability under the mortgage. The situation then of such a person toward the property is exactly the same as if the mortgage had been originally created merely as a charge on the land without any personal liability. The mortgagee may enforce his claim against the land and turn out the purchaser. The purchaser has the right to pay the claim and free the land if he wishes, but his only duty is passive, namely, not to interfere with the mortgagee. The essential justice of this distinction seems to be recognized by the French Civil Code in dealing with the case of a

[7]**Section 697. Celui auquel est due une servitude a droit de faire tous les ouvrages nécessaires pour en user et pour la conserver.**

Section 698. Ces ouvrages sont à ses frais, et non à ceux du propriétaire du fonds assujetti, à moins que le titre d'établissement de la servitude ne dise le contraire.

Section 699. Dans le cas même où le propriétaire du fonds assujetti est chargé par le titre de faire à ses frais les ouvrages nécessaires pour l'usage ou la conservation de la servitude, il peut toujours s'affranchir de la charge, en abandonnant le fonds assujetti au propriétaire du fonds auquel la servitude est due.

third person who has acquired mortgaged property without assuming liability for the debt, but who has not taken steps to clear the property of the burden. Section 2168 of the code says: "The third party in possession is held, in the same case, either to pay all the interest and the capital due, to whatever sum they may amount, or to relinquish the mortgaged property without any reserve." Section 2172 says: "As to relinquishment on account of a mortgage, it can be made by all third parties in possession who are not personally bound for the debt and who have the capacity to convey."[8]

Now this exactly represents the position of a landowner under a strictly impersonal system of land taxes. The government is perfectly protected, for, like a mortgagee, it has a prior claim on the property regardless of the accidental ownership. The owner has the right to protect his property by paying the tax, but, if for any reason he considers the tax greater than his interest in the property justifies, he has the right to relinquish the land, by suffering its seizure or sale by the public authorities, without incurring any other penalty than the loss of the land. Nor may the government justly ask for any remedy greater than the scope of its right. If its right in order to be secure must be founded on a real interest in the land, then its remedy to be just must be limited to the land.

The economic effect of a land tax as a perpetual mortgage or series of mortgages on the land is shown in the treatment of landed property as an investment. The economic value of a piece of land comprises its value for all purposes, both public and private, for which it is adapted or adaptable at a given time and place, but its effective value as an investment must allow for the burden of the public charges. This allowance amounts to a capitalization of the probable taxes at current rates of interest, so that after paying the tax the probable returns from the property will be a reasonable income for the investment. Thus the effective value is the residue of the economic value after deducting the estimated capitalized taxes. Or, to put it in another way, the purchaser discounts the burden of the tax and pays only the probable value of the private interest.

[8]Section 2168. Le tiers détenteur est tenu dans le même cas ou de payer tous les intérêts et capitaux exigibles, à quelque somme qu'ils puissent monter, ou de délaisser l'immeuble hypothéqué sans aucune réserve.

Section 2172. Quant au délaissement par hypothèque, il peut être fait par tous les tiers détenteurs qui ne sont pas personnellement obligés à la dette, et qui ont la capacité d'aliéner.

Thus, from the view of an investment, the burden literally rests on the land and not on the owner, for, although the rate of taxation may increase by new public needs and thus increase the burden, yet that is only one of the contingencies whose risk the investor assumes by purchasing the land, and, on the other hand, there is the possibility often realized that the value of the private interest in a parcel may increase more than the rate of taxation, so that a mere increase in rate does not tell the whole story in any particular case. In like manner the rate may be lowered by public economy, but the private interest in a particular parcel may nevertheless depreciate in a greater degree, so that the effective value of the private interest may be affected by a change in the tax rate and also by causes entirely outside of the public interest. It follows that there is strictly no such thing as an "unearned increment." An increase which seems to be "unearned," because not caused by the labor of the owner, has really been earned by subjecting the investment to the chance of an *undeserved decrement.* Such an increase, called an "unearned increment," really benefits the public as well as the owner, for the value of the public servitude in the land increases as a public resource proportionately with the private interest.

From the fundamental priority of the public servitude it results that the burden may be apportioned upon the separate lands of the jurisdiction according to any reasonable basis having a relation to the value thereof. Thus it may be imposed according to the income-producing qualities, as the outcome of the land in its actual condition, or, on the other hand, according to the capital value of the premises. If income is selected as the basis, it may be either the gross income obtainable, or the balance left above expenses, according as seems advisable under the circumstances of the country in the view of the legislature. So long as it is a general rule and not an arbitrary one, it is within the scope of the public right. So, too, the legislature may select the estimated economic value of the premises as the basis, or, as is more usually attempted in America, may direct the use of the effective or salable value of the premises assessed. As the public interest is prior to all private interests in the premises, it might be more strictly logical to estimate the total economic value as the basis of assessment, but as this is practically never apparent in business dealings with the land, and as the effective value is the apparent value and at any given time and place

would hold an ascertainable relation to the economic value according to the tax rate, the usual American policy of treating the market value as the basis, is not open to substantial objection. That is, for instance, it is of small consequence whether we have a tax of $15 at 1½ per cent for an assessment at a market value of $1,000, or a tax of $15 at 1 per cent for an assessment at an estimated economic value of $1,500.

As between an income basis and a capital basis in the assessment of land taxes there is much to be said in favor of the capital basis in a country of peaceful industry, for if the public servitude is plenary, there is no necessary reason why the state should limit itself in its collections when the owner fails to use his property to best advantage, but this question may perhaps be regarded as a mere matter of policy under the circumstances of a given time and country. So, too, may be considered the question whether the value of buildings and other improvements should be included in the assessed value of landed property, or should be omitted in whole or in part. It may be, as the advocates of the so-called "single tax" assert, that it would be a public benefit to omit the value of buildings and throw a greater burden on vacant land. But as between the landholder and the government it is a very different question, and if the state chooses to pursue the policy of treating as land everything annexed to the land there is no injustice thereby to the owner, for he takes his land subject to the full measure of the public servitude against the land and whatever he chooses to transform legally into land by annexation to the premises. As before said, this may be a poor public policy, but it is not an encroachment on private right, for the owner can, and in fact will, refrain from making improvements, buildings and other structures until the probable increased rentals thereby produced shall offset the added burden incurred by reason of improvements.

On the contrary, it would be inconsistent with an impersonal theory resting on the idea of a public servitude in the land to assess a tax at a greater rate because the owner happens to own a large amount of other land also. It frequently happens that when several parcels, which together make up a unified tract, are brought into a single management, the value of the combination becomes greater than the combined values of the previous parts, because the whole can be used more advantageously. In such a case the union justifies

an increased assessment, but to increase the rate merely because the person who happens to be the owner happens also to own various other dislocated parcels beyond a certain fixed arbitrary value is to exceed the public servitude and to impose a burden which varies with the accident of ownership and in effect penalizes the owner apart from the land. If the concentration of the ownership of a large amount or value of land should become merely in itself a public disadvantage, the just remedy would be to take such land by eminent domain upon the payment of just compensation to the owner instead of depriving him of part of the normal benefit of his land by the imposition of a special burden upon the particular owner in addition to the general burden on the land.

But although under an impersonal system of assessment the government may not justly discriminate against the accidental person of ownership, so, on the other hand, the accidental owner may not justly complain of the tax on the ground that the object for which it is imposed violates some prejudice, desire or personal interest of such owner. It is not "his tax" but the land's tax under the impersonal view, and as the justification for the tax rests upon the direct public servitude in the land, so the government should not be prejudiced by the particular opinions of the person who happens to be the owner of the private interest. Such owner as a citizen or inhabitant may be entitled to a voice as to the public wisdom or justice of a certain course of expenditure, but as a landowner he has no particular right to dictate the expenditure of the particular sums collected from the particular premises of which he happens to be owner or occupant.

Accordingly, the private opinions, ecclesiastical or otherwise, held by the accidental owner or occupant as to the righteousness of a course of public policy cannot vitiate the public right to the tax from his premises. The public right is the same and, if the policy is injurious, the public wrong is the same, whether the private interest in the premises belongs to John Smith, who approves the policy, or John Brown, who disapproves. Thus, the question of public support to an established church is a question of vast public consequence, but its decision should be independent of the petty accidents of ownership in particular premises. So, too, the question of the method and management of public education is a matter of vital public importance, but the right of the government to maintain or supervise

education is independent of the opinions of particular owners as to the wisdom or justice of the policy. If a given policy is truly public in its nature, then the disagreement of any particular owner cannot invalidate the public servitude over his land. It is not *his money* which is being specifically applied, but the produce of the public servitude. On the other hand, as his sole duty under an impersonal system is *not to interfere* with the collection of a legal tax from the land itself, so under such a system there can be no such thing as "passive resistance," for passivity is his right and is not resistance.

In like manner the particular owner under an impersonal system may not justly claim that the particular sums which are collected from his premises shall be set apart and expended for the benefit of some especial class to which the owner belongs. For instance, the suggestion that has been made in some parts of the South that the school taxes should be apportioned between separate schools for white and colored children according to the race of the taxpayers would be utterly inconsistent with an impersonal system of assessing lands. The education or non-education of either white or colored persons should depend on the public interests involved and not on the accident of racial ownership in the lands from which the taxes may be derived. It is generally conceded that the justification of a school tax is not dependent on the fact whether or not the taxpayer has children, and no more should the apportionment of the proceeds depend on accidents of race.

The separateness of the public interest from the private interest in land appears further in the case of a piece of property owned by more than one person, either in common by fractional shares or by some combination of partial interests, such as leasehold, life estate, or conditional estate. In a strictly personal system it would be necessary to pursue these separate individual owners of interests for taxes of various proportions and to limit any attack on the land to the specific interest of the delinquent person. But if the right of the public is directly against the land involved, irrespective of the person of ownership, then its right is entire. It corresponds with the entire private interest, and is neither increased nor decreased by the fact that in some particular case that private interest may happen to be held by a group or series of persons. The tax is, therefore, entire as a charge prior to the whole private interest, and it is for the group of owners or persons interested to determine as they choose by private contract when they create their separate

interests how they wish to apportion the payment of the tax among themselves. Thus, they may own the property in equal shares and share the burdens equally, or they may create a priority among themselves. One person may own the property and may let it to a tenant who agrees to pay a stipulated rent and no more, or, if the parties prefer, the tenant may agree that the owner shall be certain of a fixed sum and that the tenant will pay the taxes in addition. In such a case the tenant's stipulated rental will probably be small enough so that on adding the taxes he will be paying about what he thinks is a fair compensation for the use of the land; whereas, if the tenant agrees to pay only a stipulated rental, the landlord will ordinarily demand proportionately more than when the tenant agrees to carry the taxes. The law may properly provide a rule to apply in case the parties are ambiguous or silent in the terms of their contract, but the question itself is immaterial to the public servitude in the land, and should be left entirely in the hands of the parties. If the government receives its money it has no interest in dictating as to the person who shall make the payment. Moreover, such a dictation would naturally result in forcing one party or the other to ask harder terms than he would otherwise be likely to accept, in order to offset the limitation of his freedom of contract.

The same principle would apply in any attempt to dictate an apportionment of taxes between the owner and the mortgagee. The mortgagee has a real but limited right in the premises, and in the ordinary case can derive no direct benefit beyond security in case of an increase of the value of the property. Accordingly, the usual object of the mortgagee is to obtain a fixed, certain, and irreducible right, both as to the principal and interest of his investment, with the condition that the owner who gets all the benefit of any increase in value shall carry all the burdens of the property, including taxes. In thus seeking assurance against depreciation of his funds as the price of a fixed interest charge, the mortgagee is able to offer the best terms to the borrower, but if the law forbids the making of such a contract of security against the taxes, it becomes necessary to make the price of the loan more severe to offset the added contingency. Any attempt of the law to dictate such an apportionment of taxes is injurious to all private parties concerned, and is in excess of the public interest involved.

Even more reprehensible is the policy frequently pursued in collecting a full tax for the premises and an additional tax for the

mortgage, for it ought to be evident that the sum total of the value of the private interests in a piece of property is not increased by placing a mortgage thereon, and, therefore, the value of the public interests in the premises is not increased by the process. The experience of several states, notably New York recently, in attempting to collect an additional tax for the mortgage on real estate fully taxed, seems to show that so far as such a policy is effective it tends to increase the interest charge to be borne by the borrower. In 1891 Governor William E. Russell, of Massachusetts, in a message to the legislature, said: "By abolishing the tax formerly imposed upon mortgages, our state has already relieved borrowers of one unjust and oppressive burden, to the great advantage of the public." But many, perhaps most, states still pursue the older policy, on the legal theory that a mortgage is personal property and is a distinct thing from the real estate. Yet, however the law may classify a mortgage, in economic character it is representative of a limited priority in the land which sustains its value and which likewise sustains proportionately the tax resting on that land by virtue of the public servitude therein. The contract of mortgage is not the creating of a new species of economic property, but the creating of a new legal interest in preëxisting economic property. The impersonal theory of a public servitude in land attaches itself to the sum total of private interests as an economic whole and not to the separate personal interests distributively.

Many if not all of the difficulties in practice and theory in dealing with land taxation arise from a failure to recognize the existence of the fundamental public servitude as a real public interest in land, or from a failure to appreciate or observe the scope of that servitude, both as a basis of public right and a guaranty of private right in the land. The economic function of land is broad enough to include and fully support concurrently both a public interest or servitude, and a private interest or title in land. In assertion of the public servitude most of the American states have laws for the sale of lands for the non-payment of taxes, but in many instances these laws are so complicated with the survivals of a feudally personal theory that their operation is much hampered with multiplicity of technical details. It would simplify the public revenue and likewise conserve private rights to recognize fully both in theory and practice the public servitude as the sole and sufficient justification for land taxation.

Chapter IV

PERSONAL PROPERTY IN RELATION TO TAXATION

In the assessment of landed property the immobility of the land gives the state a real security for the collection of the tax as a charge on the premises, so that the public servitude in the land is not only the sole justification, but furnishes the sufficient remedy, and the tax may, therefore, be said to be literally "on the land." In dealing with personal property a distinction at once appears by reason of the mobility of some kinds or intangibility of other kinds of possessions or rights which are classified as personal or movable property. In the vast majority of cases of such kinds of property it is practically impossible for the public officials to place their hands on tangible movables, or to discover the existence of intangible rights, so that strictly it is extremely difficult, and in most cases absolutely impossible, to place a tax literally "on" such property, and the only alternative is to place the tax *on* some person *on account of* such property. Such person is usually one who is supposed to be the owner, possessor, or controller of such property, and such a tax is commonly said to be "on personal property," but in contemplation of strict accuracy the term should be discriminated as a tax "*on account of* personal property."

Now the legal assessment of a person for, on account of, or in respect to, alleged personal property is the creating of a legal charge against that person, and the creating of a legal charge against a person for the benefit of and at the instance of the state with neither such person's special contract nor wrongful act is the assertion of a proprietary claim over such person. It follows, therefore, that such a personal assessment for personal property must depend for its justification on the existence of some antecedent public right which the person assessed is wrongfully withholding or threatening to injure and on the reasonable necessity of that method of protecting the alleged right. Such a right, if and when it exists, must, in order to be sufficient, be an interest in the subject-matter on account

of which the tax is levied, and not merely a claim to dispose of the person or his effects at the spontaneous instance of the state, for such a claim would be in itself proprietary and could furnish no further justification for a personal remedy than is offered in the assertion of a proprietary claim over the person. The inquiry, therefore, resolves itself into the discussion whether the mobility or intangibility of personal property is fundamental or merely an incident unfortunate for the state and requiring special remedies, that is to say, whether there is some fundamental public interest arising from the nature of the subject-matter in any case, as the public servitude in land may be said to result from the nature of landed property.

The simplest form of personal property occurs in the case of agricultural products. For these there are two economic elements essential to production, namely, the use of a piece of land and the employment of human labor. We need not discuss the complicated question of the division of product between employer and employed, but take the simplest case of all, that is, the case in which the producer is his own laborer. In such a case the two essential elements are reduced to only one for which payment must be made, namely, the use of the land. This payment, however, must be made in all cases, even when the producer is the owner of the land, for in that case he must be treated as apportioning the product partly to pay for his investment in the land and partly for his own labor. Now the economic function of the land includes not merely the private interest therein, but also the public interest or servitude in the premises. These two interests make up the total economic value of the land, and in making economic payment for the use of the land such payment must cover the use of all interests in the land. As the public servitude is the prior interest economically, so the payment for the use of the land must be taken as applying primarily to the use of the public servitude, or, in other words, to the discharge of the periodic tax on the premises. When this is discharged for any given period the balance of the payment for the use of the land naturally belongs to the owner of the private interest. The private landlord holds his title charged with the public servitude, and to protect his interest he must satisfy the periodic instalment of that charge. Thus, although he collects in effect the whole value of the use of the land if his rental is successfully estimated, yet he

must necessarily use a part of it to reimburse himself for the periodic instalment of the public charge. Since both the public interest and the private interest in the land have been fully served by the rental for the use of the land, who has any better right to the product than the producer who has furnished the labor for the planting, cultivating, or harvesting of the crop? As King Leopold says in his open letter promulgating the reform statutes for the Kongo State: "There is no more legitimate or honorable right than that of reaping the fruit of one's own labor." We may doubtless add that there is no more incontestable right.

A similar situation presents itself in the case of mineral products. Here, too, we have the two essential elements, the use of a piece of land and the employment of human labor. It may perhaps be said that in the case of mines the taking of the product is the taking of a part of the soil itself. This is true, and may perhaps be a reason for retaining mineral lands in public control when not already granted out, as President Roosevelt has recently suggested, but its application to private mines relates to the determination of the value of the public interest in premises of that character, and can have no bearing on the rightfulness of the claim of the producer to the residue of the product after paying for the use of all the interests in the land. Since full payment must be made for the use of the land, the producer has as good a right to the product in the case of minerals as in the case of vegetable crops.

The case is the same with animals and animal products. Here again we have the use of a piece of land, as for the dwelling or sustenance of the beasts, and the employment of human labor for their care or for the collection of the product. Again the product belongs to the producer by the same principles as before, and in part must reimburse him for his expenditure in paying for the use of the land. In the case of wild animals this element sometimes becomes reduced to the vanishing point, but the element of human labor remains, and a similar situation seems to exist in the fishing industry until the product is brought to land.

In all these methods of producing raw material under the simplest conditions the element of human labor is constantly present as the justification of the producer's reward, and the use of the land is simply part of his expense of production at a given time and place. But in most instances of production there is a third factor

present, namely, the use of tools or implements for applying human labor to the task in hand. This brings us to a further class of products, namely, manufactured articles, for tools and implements of industry are for the most part examples of manufacturing arts, that is, they are not merely raw materials put to the production of further raw materials, but are made from raw materials by the application of further human skill or labor to alter, fashion, or combine those materials into adaptability for certain special uses for which the raw materials are insufficient in themselves. Now all manufactured products are not tools or implements for the fashioning of other products. Many manufactured products are made for uses quite apart from further production and some are made merely for the pleasure of their enjoyment, but the principle to be sought will be the same for all kinds of manufactured goods, as to the payment for the production and the right to the product.

As the making of any manufactured product involves the use of human labor, there seems no reason to discriminate the right of the producer to the product in that kind of case from his right to the product in the case of raw materials. The production of the simplest kind of manufactured articles differs from the production of raw materials only in the kind and quality of human labor required. The use of the land necessary for a situation for that labor is the same element in either case, and the price of its use is likewise a part of the cost of production. The product, therefore, belongs to the producer, who must necessarily pay the cost of production in order to utilize the chance to produce. If now the result of such production is a tool or implement which the producer thereupon uses for the purpose of further production of other products for which tools are required, as the producer is justly entitled to the use of the tool, by virtue of the human labor involved in its making, so the introduction of tools into the process of production does not vitiate the right of the producer to the manufactured product, and does not add any new ultimate element to the simple elements of land and labor, for the tools themselves are the product of labor and may be called packages of conserved labor. Thus the factor introduced by tools or implements into production is simply the use of the original labor in the second, third, or further degree, and the prime elements of production, land and labor, remain the same.

In all this we are assuming the simplest possible case, in which the producer performs his own labor and uses tools of his own construction. So far the only public interest that appears is the public servitude in the land used in the production, and this public interest appears to be fully served by the payment for the use of the land, since out of that payment a part or an equivalent of part must be used to discharge the periodic burden of the public servitude on the land. This payment is part of the cost of production, and the state's portion comes by reason of the public interest in the land and not on account of any interest in the product. The product justly belongs to the producer. He may necessarily be obliged to use part of it for the discharge of his obligations incurred in the production, but so much of it as he is not thus obliged to use belongs totally to him. Now, if the state, which has received full compensation for the periodic burden of the public servitude in the land, seizes a part of the product which remains after the discharge of all costs of production, it is denying this right of the producer to the product of his toil, or else it is asserting a claim to dispose of the toil of the producer, but this is in economic effect the assertion of a proprietary claim over a human being, and is no justification. On the contrary, it is not only an economic injury, but also a personal indignity.

But it may be urged that even in the simple case which we are supposing, in which the producer does his own work and makes his own tools, much of the product is in fact and intention not made for the producer's own physical use, but for an exchange for other products, and is ultimately used by a person who has had absolutely no hand in its production. Does this fact when it exists lessen the private right to the goods exchanged or introduce a new public interest into the mere ownership? In other words, is the right of the purchaser of a product less than the right of the producer? If so, then the article will be of less value to the purchaser than to the producer, and if he is in serious danger of losing part of the purchase to a superior power or of being required to pay again for the ownership, the natural tendency will be for all purchasers to offer less of their own products or services than the goods are really worth to the producer, and although in many cases the danger would be common to both sides of the trade and, therefore, offset, yet as some goods are perishable and used only for immediate con-

sumption, while other goods are for long-continued use, there would be many cases in which the one party or the other would be unable to obtain the full benefit of his product. The right of the producer to the unqualified ownership of his product after the payment of all costs incident to the production involves, therefore, the right to transfer as unqualified an ownership to the purchaser in order that the producer may be able to obtain a full equivalent for his product. It equally involves the right of the purchaser to be protected in as full ownership of the product and, therefore, the right to transfer to any subsequent purchaser the same full ownership, and so on consecutively to all purchasers.

But, as already intimated, the simple case of the producer who does his own work is only a small part of modern production. By far the greater part of modern production is done by the combined efforts of employers and employed. Does this feature of industry give to the state any new or additional public interest in the product as such? It is difficult to see how the enlargement of a productive body from one man into a group of men can lessen the sum total of the rights of the group to the full enjoyment of the product, although it may open the door to quarrels among the members of the group as to the apportionment of the product. If each member of the group does the same kind of work or service in the production, the problem is simply to determine the relative amounts done by each, but if the industry is specialized and differentiated among many kinds of work or service the problem becomes complex. But, although there may be, and undoubtedly is, a proper field for the intervention of the state to keep the peace between members of the productive groups, yet the essence of the relation of the group as a whole to the state is the same as the relation of the single producer thereto, and the sum total of the rights of the group as a whole toward the product must be the same as the rights of the sole producer. The problems of employer and employed are too multifarious to be solved off hand, but at least they are immaterial to a discussion of the relation of the state to the product. If through defective laws or unenlightened social usages the product has hitherto been inequitably apportioned among different classes of producers, the remedy lies in the reform of those laws or usages, but such erroneous apportionment as between members of the group cannot logically raise any special rights of the state on

its own behalf as against the group as a whole or any particular member of the group. The right of the state to a voice must be solely for the purpose of protecting some injured member of the group in his just rights, and not for the spontaneous benefit of the state. In other words, the position of the state should be as judge between contesting parties and not as claimant for the spoils of battle.

It may perhaps be urged that the state has a public interest in regard to the kinds of goods which may be produced within the jurisdiction, and, therefore, has the right to prohibit the production of such commodities as it pleases except upon the condition of paying an excise tax therefor, and in default of payment to close up the business. It may also be urged that many articles are not ultimately enjoyed or intended to be enjoyed within the nation where they are produced, that the government has a public interest in regard to the kinds of goods which may be brought into the country, and that, therefore, the government may rightfully prevent the importation of such articles as it chooses except upon the condition of paying an import tax for the importation. It is not necessary to discuss here whether or when a government has the right to levy an excise tax for production within a country, or an import tax for introduction into a country, but we may say, if and when such taxes are levied, that they are a part of the cost of production or delivery at a certain market, and that after the discharge of such costs of production or delivery, the product, just as certainly as in the simpler case, belongs to the producer or his purchaser in unqualified ownership throughout that jurisdiction.

The right to the product involves the right to the whole and to each and every part of the product which remains after the costs of production and delivery are paid. It also involves the right either to use up that product at once or gradually, or to keep that product for an indefinite time, and to be protected therein. This protection is a matter of right and not a special privilege for which a charge may justly be exacted from time to time. It is one of the reasons for which governments exist. It is one of the reasons why the state is entitled to a public servitude in the lands of the jurisdiction in order that it may maintain an organized community in which there shall be some degree of security for life and the enjoyment of the products of human labor, from which security comes the possi-

bility of any value in the land as a field for human industry. If, therefore, the state exacts a charge for the ownership of such products as have been kept beyond the tax period wherein they have been produced or brought to market, the state is charging a price for that protection which it should give to property as the function of a state's existence. If, further, the state attempts to impose a burden on an inhabitant merely for the ownership of goods which have never been brought within the jurisdiction or have been lawfully removed therefrom, the state is thereby denying that protection which it should give to the inhabitants irrespective of their wealth or poverty, and by denying the right to the unquestioned ownership of property beyond the jurisdiction the state is asserting a proprietary instead of a protective dominion over the inhabitants.

It follows, therefore, that in regard to physical commodities there is not such economic interest as would correspond with the public servitude over landed property, and that the principle of unqualified private right applies to all such articles, because they are the products of human labor, whether they are in the hands of the original producer or in the hands of a purchaser, whether they are produced by a single independent worker or by a productive group, whether they are produced or situated within or out of the jurisdiction, and whether they are produced or introduced with or without any charge for an alleged public interest in the kinds produced or introduced.

Any attempt, therefore, on the part of the state to seize a part of such goods merely because they are private property, or to impose for its own benefit a burden on the owner or possessor merely because of the ownership or possession, is in economic effect a denial of the producer's or the purchaser's full right to the goods, or an assertion that he holds them not in his own right, but in the right of the state. Such a claim on the part of the state by its own initiative is economically a proprietary claim over the man, inasmuch as it lessens his beneficial interest in his own life, denies his right to make or acquire the products of human labor, and deprives him of such products irrespective of any antecedent public interest in those products or the labor by which they are produced.

Besides the products of human labor, however, there are, also classed as personal property, many kinds of representative interests

or rights of action in respect to the present or future use and enjoyment of property. One of the commonest of these is a simple debt for the payment of money. This is a very frequent result of the many kinds of transactions by which men seek to enjoy or develop land and the products of labor, and it, therefore, becomes important to examine the economic nature of a debt. It is notorious that, although a debt may be expressed in money units, there may in fact be no money actually advanced at the time. The consideration, cause, or occasion, for the debt may for instance be the sale of lands or goods for which the purchaser is not yet ready to pay or the performance of labor for which payment has not yet been made. Nothing economically new is created by the creation of the debt. It only represents the right to compensation for a particular transaction. In so far as it may represent land bought by the debtor or any other just source of taxation, it is helping to support taxation through the taxation of such land or other such source. In so far as it may represent the products of human labor or payment for labor, it ought not to be any more an occasion of taxation than the ownership of the products or the labor which it represents; for otherwise we should say that, though the products belong entirely to the owner who has them, the right to receive them does not belong entirely to the person entitled who has not yet received them. Again, in so far as a debt represents deferred compensation for services or any transaction, it represents what the creditor has not yet obtained, and if the state requires a tax for holding such a claim, the state is in effect denying the full right of the creditor to such compensation. Even in the normal case, when money is actually advanced the debt does not lessen the right of the owner of that money. The money itself is either some physical commodity produced by human labor, such as gold, silver, copper, or whatever may be in use, or it is some conventional representative of such commodity. Now, if the private right to the product of human labor is unqualified, it must attach no less to a commodity or its representative used for currency than to products in other legitimate uses, and the mere fact that a debt represents money is no ground for imposing any tax in respect thereof.

Nor is the situation any different if the debt is secured by a claim or charge against property. One such case is a mortgage of land. Two men may wish to use their resources in holding or using

a certain piece of land, but while one of them wishes to hold or use it in anticipation of some possible increase in selling price or for some other special advantage, the other may be interested in it merely as a basis of reasonable security. The first will, therefore, take the title to the property and with it the chance for any advance and the benefit of any special advantages in the property, while the other will take a mortgage for a fixed and prior charge on the property. As the mortgagee is seeking security without contingent profit or advantage, he will naturally give the best terms when he receives the strongest assurances against contingent loss; while as the holder of the title is entitled to all contingent advantages, it is only equitable for him to agree to protect the mortgagee against the burdens which rest on the property, or arise on account of it, and which if thrown on the mortgagee would lessen his security. Accordingly, it is not unreasonable when the title owner agrees to save the mortgagee harmless from any taxes which may be levied in respect to any part of the combined investment. The state loses nothing thereby in respect to its public servitude in the land, for the servitude remains prior to all kinds of private interests in the land, while, as heretofore shown, the existence of the public servitude excludes the right to burden particular owners factitiously.

Again, if the fact that a simple debt is expressed in terms of money is no just ground for the imposition of a special tax in respect to the debt, no more should a mortgage be considered the occasion of a tax by reason of representing money aside from the security in the property mortgaged; for the money itself in the one case as in the other is only a product of human labor or the representative of such product.

Now it is evident that the placing of a mortgage on the land does not increase the value of the land or create any new land or any new economic commodity of value aside from its representative character, whether we regard it as legally a landed interest or an item of personal property. Nor does the fact that it is usually expressed in terms of money units alter its economic effect, which is the same whether the legal property created is heritable or movable. The mortgage of land is merely a piece of legal machinery which represents a particular kind of priority in an entity which, as a whole, supports the charges of the public servitude, and on the other hand the mortgage is no ground for lessening the mortgagee's

right in the equivalent of the money advanced or secured; so that, neither on the basis of a real interest in the land nor on the basis of a representative interest as personal property, is there created by the mortgage any new public interest justifying a special tax in respect to such mortgage.

Nor can the mortgagee's right be justly less in case the land lies outside the jurisdiction of his own home. In such a case the mortgage becomes as to that jurisdiction as if it were a debt without security, or perhaps, rather, a debt secured by a species of security in which the jurisdiction has no just interest for taxation. This would be analogous to a debt secured by a mortgage or pledge of the products of labor according to the foregoing pages. If a mortgage of land is, as respects the land, a mere piece of legal machinery for securing a prior claim over a certain economic entity, and if the apportionment of such entity among a series of private interests is no ground for imposing a special tax on account of those interests, so also a mortgage or pledge of personal property is as respects such property only a piece of machinery for the securing of legal claims against such property, and such apportionment of interests therein can be no ground for any additional tax beyond that for which the property itself should be the occasion. If, therefore, such property consists of the products of human labor, and if such products do not furnish any economic basis for imposing a tax in respect to the ownership thereof, then the mortgage or pledge of such products cannot justly be the occasion for a tax, for such mortgage or pledge is only a part of the unqualified private right in such goods; and the same principle would apply in regard to any other property for which no public interest of taxation may appear. To attempt, therefore, to levy a special tax against the mortgagee or other creditor as such, is a denial of his right to participate in a legitimate transaction. Such an attempt is a violation of the just freedom of the creditor, since it seeks to burden him for an act or thing to which he is entitled as a matter of economic right.

There are, however, many kinds of voluntary contracts and just obligations besides debts expressed in money units. They may be classified generally as claims for some compensation, or for the delivery of or dealing with certain specified property, or contracts for the doing of certain acts, as, for instance, the performance of legitimate employment. In respect to these the same principles

should apply as in the case of mortgages and other debts expressed in terms of money units; namely, that such a legal claim is only a means for the apportionment of the enjoyment of the property, transaction, or services specified therein, and that the existence of such claim is no just ground for the imposition of any other taxes than those for which such property, transaction, or services, from their particular nature may furnish the just occasion. If, for instance, a contract deals with a conveyance of land, or deals with a matter having a public interest, the land itself, as in the case of a mortgage or the matter of public interest, is the element of taxation present. If a contract deals with a sale of the products of labor the fact of sale cannot furnish any ground for lessening the private right in such products.

A merely representative interest, therefore, furnishes in itself no public interest justifying a particular tax for the private ownership; for if it represents a subject-matter in which there is a just public interest of taxation, as land, then the imposition of a special tax on account of the merely representative interest would be to impose a burden in excess of the public interest involved; while if it represents a subject-matter in which there is no just public interest, as products of labor, then the imposition of a special tax would be to impose a burden collaterally where there is no public interest inherently. Moreover, the exclusively private right in merely representative interests would not be affected even if the doctrine of these pages as to the products of labor should be shown to be erroneous, for in that case a representative interest in respect to products of labor would then simply be analogous to a representative interest in respect to land, and the public interest would attach to the economic subject-matter and not to the representative interest. The attempt, therefore, to impose a tax on the owner or holder of a merely representative interest in respect to any property or undertaking, and merely because of the ownership or holding of such interest as private property in law, is a denial of the full private right to such representative interest and the assertion of a proprietary claim by the state over such owner or holder in respect to the disposition of his own resources.

The great bulk of personal property, so-called, consists of representative interests comprising largely the evidences of indebtedness of national and local governments and the securities of corpora-

tions or companies for their indebtedness or other obligations. These corporate securities are the means by which the present or future, simultaneous or preferential, participation in the use and enjoyment of property is distributed among the members of some group or combination of persons for the prosecution of some enterprise or investment. Such securities are of two general classes, first the bonds or other evidences of indebtedness, and second the shares of stock in such corporations. The indebtedness of a corporation, which is an artificial person existing by law, is in no way different from the indebtedness of a natural person, although it is frequently evidenced by more elaborate documents intended to pass readily from hand to hand, and it is, therefore, fair to say that the creditor or holder of such evidence of indebtedness is as fully entitled to his ownership of such claim as he is to the ownership of a debt contracted by a natural person.

The case of stock of corporations stands on a somewhat different basis, for it is a claim of a kind which is not strictly capable of being issued by a natural individual. It implies either a group of persons or an artificial person existing by law, that is to say, a group of persons may naturally agree among themselves for the division of a particular business or undertaking into fractional parts among themselves, or an artificial body when authorized by law may divide its business into fractional interests and sell those interests to various persons. Now the economic meaning of a share is the same whether it is issued by a group or an artificial body; that is, it is merely representative of a claim or action against the group or body for a fractional participation in the benefits of the enterprise after the discharge of claims having priority, but while a group of persons may by their voluntary choice divide an enterprise spontaneously, an artificial body can do so only by law. Does this legal element introduce a new factor lessening the owner's right to the unqualified ownership of such a claim when it is once legally created? The existence of the corporation as a distinct artificial entity raises a variety of questions as between the state and the corporation, for the legal body or capacity of the corporation is created by the state, as commonly said, or perhaps more accurately is created by the organizers of the company under the license of the state, but the existence of the artificial person equally implies that in spite of any special relations between the state and the corporation the right to

the unqualified ownership of such obligations as are lawfully issued shall be as complete as the ownership of any other representative interest, whether they are issued as debts or as shares of stock, for the shares in a business are merely actions against the group or body conducting the business and relate to the ultimate disposition or enjoyment of the assets of the enterprise.

The mere fact, then, that shares are issued by an artificial body, while it may affect the power of such body, should not differentiate shares of stock from other representative interests as to the completeness of the owner's right to such as are once legally issued. That is, the public interest in respect to such corporate shares goes to the legality of the issue and not to the right of the owner to the complete ownership thereof. If the corporation owns property which, like land, involves a just public interest of taxation, such property must pay a tax as between the corporation and the state. If the corporation owns property for which no tax ought to be exacted, still less ought the shareholder to be burdened for his representative interest. As the public servitude for taxation of land attaches to the whole of a particular landed property as an entity and not to the separate interests therein distributively, so any just public interest of taxation in respect to a corporate enterprise attaches to the particular properties in the hands of the corporation or to the enterprise as a whole and not to the representative interests of security holders distributively. Government securities and corporate stocks and bonds, therefore, are merely special types of the general class of representative interests and offer no distinctive ground for the imposition of a special burden on the owner because of the ownership. Such a tax is a violation of his right to acquire and hold such interests in the place where they are lawfully issued, and is, therefore, an invasion of his just freedom.

Nor is the doctrine of the right of unqualified private ownership of corporate securities derogatory to the state's power in dealing with the corporations which it has created. On the contrary, the doctrine recognizes and reinforces that power, for while a natural person is entitled to his freedom as a matter of natural right, a corporate person is entitled only to that which the law confers upon it. The absolute responsibility of a corporation to the law for any infraction of the terms of its existence has been too often and too recently affirmed by the courts to need any amplification, and the

reasonableness of such a rule is too obvious to need discussion. Any deficiency, therefore, in the amount of taxes raised from corporate enterprises is a matter which should be treated by amending the laws as between the corporations and the state, and not by factitious assaults upon the holders of representative interests, for the corporation is always and necessarily in the grasp of its creator, the state, while the natural person is entitled to freedom. Jonathan Edwards' famous word picture of sinners in the hands of an angry God, who shakes them over the fires of retribution, however it may offend theologically the present feelings of men, is at least an appropriate likeness of the position of a recalcitrant corporation in the hands of an outraged people, and suggests a legitimate means of dealing with the evils of corporate mismanagement and aggression.

There is, however, a widespread belief throughout the United States and Canada that a portion of the public revenue should be raised out of personal or movable property, and accordingly the states, territories, and provinces generally have more or less stringent laws for taxing the owners of such property. Every inhabitant is liable to be investigated by the state or local officials for the discovery of any personal property for which taxes are demanded in the particular jurisdiction, so that in America to-day we still have a rough similitude of the old feudal society, with the nation or a state of the union representing the king or a duke, and the municipality representing the lord of the manor, as if the personal property in the jurisdiction were to be considered as held mediately or immediately of the state or municipality to which feudal services must be rendered in return. This feudal parallel is further shown by the historic fact that this method of taxation comes down from colonial times along with the personal method of assessments for real estate, and that it resembles some of the taxes levied by the medieval English kings, particularly the taxes called "tenths" and "fifteenths," which are described by Blackstone (Book 1, Chapter 8) as "temporary aids issuing out of personal property." He says they "were formerly the real tenth or fifteenth part of all the movables belonging to the subject," but were fixed at definite sums for each district in the reign of Edward III.

The various states differ widely among themselves in the kinds of personal property which they select as the occasion for these

taxes. Nor do they limit themselves to a merely feudal claim for property within the jurisdiction. Some states, as Massachusetts for instance, seek to tax the inhabitant for physical articles situated outside the jurisdiction, and for stock in corporations not organized under the local law. These taxes are commonly called "taxes on personal property," but it is obvious that it is physically impossible for a state to put a tax *on* a drove of cattle, for instance, situated outside the territory of the state, or *on* a share in a corporation which has no charter under local law. The most that the state can do physically is to tax the owner within the jurisdiction for owning such property outside of the jurisdiction.

It is commonly said in the law books that property must have a situs in the jurisdiction in order to justify taxation, but then it is said that movables are held to follow the person of the owner and to have a legal situs at his domicile. This is, however, merely a way of saying that if a certain property can be moved, or is of a kind ultimately resulting in cash, as a debt, the state will deal with the owner as if he had already moved the goods or the proceeds into the jurisdiction. This is necessarily a denial of the owner's right to such property and a claim that he must hold it primarily in right of the state. It shows, however, the true nature of the claim for taxes on account of personal property as a charge against the person of the owner. If, as herein contended, the products of human labor and the merely representative classes of personal property involve no public interest analogous to the public servitude of taxation in land, then the imposition of taxes on the owner of such personal property merely on account of the ownership is a denial of the full right of such owner and an invasion of his just freedom, inasmuch as it restrains him of his property without the basis of an antecedent right for such restraint. Such a restraint is economically a proprietary claim over the owner, and is a servitude over the person rather than over the thing.

This servitude over the person appears not only in the nature of the claim made, but even more in the methods of its enforcement, with arrest of the body in some states, and a general liability to the seizure of property other than the specific property for which the tax is levied. The particular details for the assessment and collection of the tax vary in the different states, but in general they depend on some action by an officer or assessing board amounting

to an informal or summary decree that a certain person must pay a certain sum for alleged personal property. This is often or generally accompanied by some provisions requiring the person assessed or assessable to appear and disclose his possessions under examination by oath either before or after the action of the public officials, with the penalty that on default of such disclosure the action of the officials shall be final and binding upon him personally. These methods are practically necessary if such taxes are to be enforced at all, but such necessity should in itself condemn the system of such taxes, for it ought to be evident that the spontaneous issuing of a decree by an external authority against a person for the arbitrary benefit of that authority is an invasion of that person's just freedom and the assertion of a proprietary claim over that person, while the enforced interrogation into a person's private affairs solely for the wilful benefit of the interrogator without the basis of antecedent right is of itself the very essence of servitude over that person.

Perhaps it will be objected that just as in the market value of land the average purchaser of landed property for investment will discount the effect of the tax, so in the purchase of investment securities he will pay only such a price that the probable returns of the property will leave him a fair return after the payment of the tax, so that in the end he will not suffer appreciably. There is undoubtedly a tendency in this direction, but as the state in the great majority of cases has no available hold over the property itself, the question of the necessity of paying the tax in any particular case is entirely problematical, and in the nature of a fortuity against which some allowance must be made, but which, in the long run of chances, will be manifested by an allowance much smaller than the actual tax. This seems to be shown by the general standard of prices for taxable and non-taxable securities, the non-taxable commanding an appreciably better price over taxable securities of the same general class, but the difference being much less than the tax itself would indicate as necessary. If in any particular class of investment the tax becomes practically effective this difference in price will tend to offset the tax, and in the end the person or enterprise seeking to raise money by the issue of such securities will indirectly suffer by realizing a less sum than the face of the paper would seem to indicate, or, which is the same thing, by paying a higher interest charge for the advances of capital.

This was apparently the case in the recent experience of New York with a mortgage tax. The law was so diabolically effective that interest rates at once rose proportionately with the tax, and borrowers soon began to call for the repeal of the law. The experiences of some other states with mortgage taxation have been similar, so that we may say that when a law for the taxation of creditors is really generally effective it defeats itself and throws the real burden on the borrower by causing an increase in interest rates or other costs in negotiating the loan. This principle has been long recognized by some governments in negotiating their own loans. For instance, the United States Government and some state governments make their own bonds exempt in the jurisdiction of such government in order to obtain the best possible prices for them. The same principle should be recognized in favor of private borrowers. There is no reason why the state should play the game of life with loaded dice. If the fact of being in debt should be considered a good ground for taxing the debtor, it would really be better for the debtor to know it and pay the tax openly rather than covertly through the medium of increased interest charges.

Although in a large number of cases it is practically impossible to enforce these personal property taxes according to the theory of the law, yet in certain cases it becomes possible, and then these taxes fall with unmitigated severity. Such cases are generally those in which taxable personal property is held in a fiduciary capacity under the order of some court, for then an exact disclosure must be made. Thus the estates of deceased persons, while going through the probate courts, and trust funds under wills, or the estates of children under guardianship, are peculiarly exposed to attack. The loss in such cases frequently falls on dependent persons who really need every dollar of their funds, and this result is the most likely when the laws are the most stringent.

Nevertheless these taxes seem to be most favored by the poorer portion of the community, under the supposition that in some way they are hurting the selfish rich, whereas the more selfish the rich man may be the more readily will he resort to every expedient and device to escape, so that one consequence of these laws is that many of the choicest investments suitable for persons of moderate means are practically forbidden to many such persons and are driven into the hands of the less scrupulous portion of the community. Thus a

system which is supposed by its advocates to be founded on equality really rests largely on the borrowing business man and the dependent classes, and instead of being, as it is called, taxation according to ability, may almost be described as taxation according to vulnerability. But the cause of this runs deeper than the details of the law into the system itself. The system is not only defective and burdensome in practice, but unjust in theory, for it is a denial of fundamental right, an invasion of true freedom, an assertion of proprietary claims over human beings, resulting in a servitude of the person rather than of the thing.

Chapter V

FRANCHISES IN RELATION TO TAXATION

The difference between landed property on the one hand, and merchandise, the product of labor, on the other, is that one is only a qualified private interest in a subject-matter in which from its nature there resides a public interest concurrent with and prior to the private interest, while the other is a subject-matter over which the private right should justly be considered as entire and exclusive. So, too, the intangible representative interests which make up so large a portion of property holdings should be considered as representing in themselves entirely the interest of their owners, so that neither in movable goods nor investment securities is there any such public interest as the public servitude in land to justify or require the depleting of the separate private interests involved.

But merely representative interests do not constitute the whole body of intangible property. Just as in regard to tangible property, that is, lands and goods, we find two classes, one, lands involving justly a public interest of taxation, and the other, goods, involving justly no such interest in respect to the mere ownership thereof, so in regard to intangible property we should expect to find a class of rights involved naturally with a just public interest of taxation as well as the merely representative rights involving no such public interest in respect to the mere ownership thereof. Such a class of intangible property involving a public interest appears in franchise rights artificially created by the law. As a title to a specific piece of land is individualized from all the rest of the surface of the earth by the artifice of positive law in an organized society, so these intangible artificial rights are carved out of the whole field of human activity by the grant of the organized state which recognizes and supports them. That is, these intangible rights exist not by the creation of the labor of man, nor as merely representing a claim to participate in the proceeds of some particular enterprise, but as the manifestation of the continued existence of that juridical per-

son, the organized state, which exercises the public functions of the community.

Such rights are special privileges created for some assumed special purpose which will be, or is supposed to be, beneficial to the industrial development of the community, and, therefore, when granting or recognizing such a right the state may be considered as a kind of special creditor which has contributed a valuable ingredient to the assets of an enterprise. The fact that such rights are special privileges does not in itself render them an unjust exhibition of state power or an unjust species of property. A land title to a particular piece of the earth's surface is in a certain sense a special privilege, but it does not follow that property in land is an unjust species of property. On the contrary, it is difficult to see how land could be effectively used without creating some kind of proprietary right therein, for any use involves at least some temporary occupation recognized by the law, and any such occupation, however ephemeral, is, while it lasts, of the nature of a proprietary right. A mere estate at will gives some right to the tenant till the estate is terminated. Hence, if the effective use of land requires the recognition of some degree of proprietary right, the extent of that kind of right to be recognized by the law is only a matter of policy, whether there shall be estates at will, for years, or in fee simple, although estates once created should be sacred. That is to say, it would be perfectly legitimate for a new state starting out fresh on virgin soil and owning all the land in the jurisdiction to decide that it would grant no title greater than a lease for a certain maximum period. Such a policy might prove unwise in its result, or it might prove beneficial in some communities. So also a policy of acquiring or keeping in governmental control lands of some particular characteristic would be a legitimate policy, as, for instance, the water front of a great city like New York, lands reclaimed from the sea like the Commonwealth flats at South Boston, or mining lands containing a commodity of great public importance, as President Roosevelt has suggested in regard to coal and oil lands.

In all such cases the question of public or private ownership is only one of policy, provided only that if public policy is applied to lands in which there are pre-existing private rights, full compensation is paid therefor. So, too, on the other hand, if a state decides that it is advisable on the whole to have private estates of fee

simple for private owners and their heirs and assigns forever, that, too, is a matter of policy, and the institution of private property in land is not in and of itself an unjust establishment. It is, to be sure, an institution which may be abused or coupled with unjust concomitants as in the feudal tenure, but the abuse or collateral injustice is not inherent in the institution itself. On the contrary, if concurrently with the private right in the land we recognize the public servitude of taxation therein, the institution of private property in land becomes a valuable means of realizing from the industrialism of the community upon the public as well as the private side.

Thus the mere fact that private property in land may, in a certain sense, be called a special privilege does not condemn the institution as such, but merely raises the importance of the concurrent public interest. So, too, the creation or recognition of an intangible special privilege or franchise is in itself not an occasion for condemnation, but rather for the assertion of some public interest connected therewith. This is a principle which has been somewhat recognized in the legislation of some of the American states and seems likely to become more so in the future. The most conspicuous example of this in recent years is the well-known act called the Ford Franchise Tax Law of New York, an act which has passed through the Supreme Court of the United States in the case of the Metropolitan Street Railway (199 U. S. 16), and which, even if it should later be overthrown by the courts on some technical ground, would nevertheless mark a distinct advance in the road toward reaching and applying one of the most abundant resources for legitimate public revenue.

The principle of franchise taxation is not, however, altogether clearly defined in the general treatment of the subject. It is commonly said that a franchise ought to be taxed because it is property, but if there are some kinds of property which do not furnish a just occasion for taxation by the mere ownership thereof, then it is obvious that the mere fact that a franchise is property, however sufficient that may be legally under existing law, is not a sufficient basis for justifying the tax. For that purpose it is necessary to say rather that a franchise is a special kind of property involving collaterally a public interest, and it is, therefore, important to consider the scope and bearing of that interest in relation to taxation and the enforcement thereof.

Franchises were recognized as property rights under the English common law and were classified as incorporeal hereditaments. A franchise was considered to be "a branch of the king's prerogative subsisting in the hands of a subject." The word "franchise" in its origin means "liberty," but in its common use it refers not to liberty as an abstract principle, but rather to some particular grant or recognition of some specific liberty in the sense of permission. Bracton, in dealing with franchises (Book 2, Chapter 24), uses the Latin word *"libertates"* in the plural, and this seems to show that in using the singular in the same connection he is referring to some particular liberty as a privilege of the law or a right guaranteed by the law rather than to liberty in the abstract. He also calls these liberties "the aforesaid privileges" (*privilegiis supradictis*).

This use of the word "liberty," in a special rather than a general sense, is common throughout the succeeding centuries of English history, and seems to be the meaning of the word in the Massachusetts "Body of Liberties" of 1641. Among his special liberties Bracton includes an exemption from taxation. He says on this point: "For a liberty is an evacuation of a servitude, and they regard each other in a contrary manner, and, therefore, they do not remain together. For there may be a liberty thus, if a person be bound to give something on the ground of a servitude, as, for instance, toll and customs, he may, on the ground of a liberty, be defended from giving them at all. (Est enim libertas evacuatio servitutis, et contrario modo sese respiciunt, et ideo simul non morantur. Esse enim poterit libertas, ut si quis teneatur ad dandum ex servitute, sicut theolonium et consuetudines, ex libertate defendi poterit ad non dandum.) It is certainly interesting to observe that six hundred years ago personal liability to taxation was described as servitude.

Apparently, however, Bracton was annoyed at the thought of servitude in England, for, in discussing liberty and servitude in the abstract (Book 1, Chapter 6), he alleges that the word "servitude" is derived from the Latin word *Servare,* to preserve, and not from *Servire,* to serve; a characteristically medieval etymology which does more credit to his patriotism than to his philology. According to this view, the services rendered under servitude are only compensation or gratitude for the preservation of the serf's life by the master, a strictly feudal view. Bracton in this general discussion

seems particularly desirous of showing that the servitude of the serf is not inconsistent with the freedom of the English law, a very difficult position in the point of view of the present time, but one which well illustrates the interlocking of the two principles in feudal society. It has its counterpart, however, to-day in the opinion which seems to be held by some that the rights and security of the state and the community require the undermining or denial of private rights.

At common law franchises might be of many different kinds. Among them was the franchise of being a corporation. This may be called merely a general franchise necessarily present in every case of incorporation. In addition to this, there are various special franchises which, from the nature of the business to which they relate, are not easily manageable by a natural person, and as a matter of fact are generally found in the hands of a corporation, but in theory at least might belong to a private individual. It is these corporate franchises which make up the great bulk of franchise property in these days, and aside from the general franchise of being a corporation these special corporate franchises may be roughly divided into two groups: business franchises, or rights to do specified acts generally throughout the jurisdiction; and local franchises, or special rights in respect to some particular piece of public property, as, for instance, the right to maintain a railway in a public street. In a still more general sense the sum total of all the franchise rights, general or special, of a particular corporation in a given jurisdiction may be conveniently called the corporate franchise, and treated as a whole as something used in an entire enterprise.

From this convenient consolidated use of the term "corporate franchise" we naturally get the common expression, "the taxation of corporations," which is well enough as a phrase if we bear in mind that aside from the merely general franchise of being a corporation the justification of corporate taxation must rest in theory on the fact that the state has somehow put something into an entrprise, something of real assistance to the enterprise, or on some inherent public interest in the kind of business undertaken, rather than on a mere desire to obstruct the corporate manifestation of human activity. It would be exceedingly unfortunate to base a public policy on mere hostility to a particular kind of legal machinery, namely, the corporation, which by its organism and its continuity offers most

advantageous means of individualizing and concentrating a particular enterprise into a vitality of its own; so that neither the death of individuals need destroy the enterprise, nor the failure of the enterprise need overwhelm the individuals concerned therein.

Accordingly, we should carefully bear in mind that in strictness it is the franchise as a special privilege connected with a certain enterprise, rather than the corporation, that offers the occasion and justification for taxation; so that in theory at least the enterprise as an entity would pay the same taxes if the franchises were vested in a private individual. It is, however, true that the fact of incorporation, by reason of the artificiality of the body, sometimes offers particular facilities for dealing with the matter in a manner which might be open to just objection in dealing with a natural person, since an artificial person may justly be treated with a particular degree of responsibility to its creator, the state. But this qualification may be referred to the general franchise of being a corporation, as one of the incidents thereof.

With the distinction well in mind that it is the franchise and not the corporation which offers the just occasion for taxation, we may treat the intangible franchise as an entity and draw an analogy in some degree with the characteristics of landed property. Each is an artificial right created or recognized by or under the law of some particular jurisdiction and, as the law books might say, in derogation of common right; not that either is essentially unjust as the violation of any particular person's particular right, for we are not speaking of arbitrary monopolies, but each is in a certain sense carved out of that general stock which, not being created by any particular person, may be considered as the common right until so carved up. As in each case the artificial right exists by the support of the organized state as the agent or manifestation of the community, which, by its peaceful industry, gives usefulness and advantage to the entity created, so in each case, with franchises as well as with landed property, the private interest may justly be held to be concurrent with a public interest in or over the entity to support on a basis equitably related to other entities of the same kind the public expenses of the jurisdiction in and by which it exists.

In further analogy with landed property the public interest in a franchise should be considered as an impersonal charge against the

franchise itself and not as a personal obligation against the owner, either in respect to the ownership or on account of some collateral circumstance of the owner, for that would be a servitude over the owner. By this view, as the sole duty of the owner of land under an impersonal system is to be passive when the state legally enforces a tax upon the land, unless the owner wishes to redeem the land by the payment of the tax, so in the case of a franchise the sole duty of the owner of a franchise would be to desist from the exercise of the franchise when the state asserts its public interest, unless the owner of the franchise wishes to redeem the same by paying the tax. In this sense the tax may then be said to be on the franchise instead of being on the owner on account of the franchise. The difference in the application of the theory to the two kinds of property would come merely from the difference between the tangibility and intangibility of the subject-matters. Land is tangible, and the claim of taxation against the land may be ultimately enforced by the physical seizure of the land. A franchise is intangible, and the seizure must, therefore, be symbolical, or the franchise may by its terms be made perishable on default of payment. If the owner of the franchise simply desists from exercising the same when notified that the state is asserting its right over the franchise by due process of law for the cancellation or condemnation and sale of the franchise, he should, therefore, be considered as entirely within his rights and should be liable to no other penalty than the loss of the franchise itself.

This principle that the owner should desist at the assertion of the public interest is apparently at the basis of the provision sometimes enacted authorizing an injunction against continuing to act under the franchise on default of payment of the tax, for, although an injunction is a remedy against the person, it is a negative remedy, notifying him of the assertion of the public interest and ordering him not to interfere with the right of the state. Here again the analogy of landed property helps to explain the impersonal view. If the owner of land instead of paying the tax or peaceably yielding possession of the land to the person lawfully entitled under the right of the state for the collection of the tax, should violently hold possession by force he would obviously be exceeding the principle that the state should look to the land and not to the owner for the tax. So, too, if the owner of a franchise should refuse to desist

when notified of the default and the assertion of the public right, he would be exceeding the limits of the principle that the state should look to its interest over the franchise and not to the owner, and he would, therefore, have no just ground of complaint at the employment of a remedy like injunction for his threat to exercise more than his right.[9]

In practice, however, the importance of this distinction between impersonal taxation on the franchise and personal taxation for the franchise is of much less consequence than the same principle as applied to land, because almost all franchises of any considerable value are, as a matter of fact, usually held by corporations and include, of course, the general franchise of being a corporation, from which general franchise the artificial entity or juridical person may in many instances be justly and legally held to a degree of supervision which would be unjust in the case of a private person in the absence of some particular characteristic of the business conducted. It is also of interest to observe that those businesses which, from their particular characteristics, may be said to have a semi-public nature, are usually so large or intricate as to be in the hands of corporations. Thus the very fact which renders incorporation useful in a given case may also justify a particular restraint upon that business, while the general power of the state over its corporation furnishes the ready instrument or channel for the convenient application of that restraint.

The valuation of a corporate franchise is a problem that has not reached a unanimity of treatment, either in fact or in theory. In general there is a disposition to regard the value of the franchise as roughly represented by the difference by which the securities floated by the enterprise exceed in market value the cash value of all the assets other than the franchise. Theoretically, if we could always be reasonably sure of all these elements of the problem, this method might be entirely sound, but the matter is still somewhat in the experimental stages. There is a difference of opinion as to the classes or kinds of securities which should be taken as the basis of the estimate. For instance, the corporation act of Massachusetts of 1903 requires the tax commissioner of the commonwealth to estimate in regard to a corporation "the fair cash value of all of the

[9]On this point see a recent case in Massachusetts, Scollard *v.* The American Felt Co., Feb. 26, 1907.

shares constituting its capital stock on the preceding first day of May, which shall, for the purposes of this act, be taken as the value of its corporate franchise. From such value there shall be deducted the value as found by the tax commissioner of its real estate and machinery within the commonwealth subject to local taxation, and of securities which, if owned by a natural person resident in this commonwealth, would not be liable to taxation; also the value as found by the tax commissioner of its property situated in another state or country and subject to taxation therein." (Acts of 1903, Chapter 437, Section 72.) The tax is to be assessed at an average rate of local assessments for the whole state, and there is a provision for a maximum and a minimum tax.

Now it is to be noticed that in this Massachusetts act the shares of stock at their fair market value are taken as the measure of the franchise and, after the deductions are made, as the measure of the tax, while securities in the form of debts, such as bonded indebtedness, are ignored. The result is that the tax may be made very different by the simple device of varying the form of the securities issued. Thus the very same enterprise needing $200,000 to be invested, would pay a much larger tax if it should raise it all by issuing stock than if it should raise half by issuing stock and half by issuing long-term bonds. It is accordingly believed by some that capital embarked in an enterprise by a bond issue or other indebtedness should be considered on the same footing as the value of the stock in estimating the franchise. It is true that there is supposed to be local taxation on account of the bonds, but it is notorious that if such taxation were at all effective, for the most part the bonds would not be salable at prices making the interest at all moderate for the corporation, so that the omission of bonds from the franchise computation is really an invitation to the bondholders to take advantage of the defects in the professed scheme of local taxation.

The open recognition of bonds and securities generally, as merely representative interests for which the holders should not be personally liable to taxation, would logically require that bonds should be on the same footing as stock in estimating a franchise, since they are simply different kinds of claims to ultimate compensation, or benefit out of one entire enterprise. Just as a mortgage of land may be said to represent merely an interest in one

entire entity, the land which furnishes the occasion and just object of the tax, so the indebtedness incurred to raise capital for an enterprise, even if such indebtedness is not secured by any actual mortgage, is, in its priority over the claims of stockholders, a kind of mortgage on the enterprise, and makes up part of the whole which, as an entity, should be the occasion of taxation rather than the separate interests therein distributively. This principle of taxing the enterprise and not the owner has been partially recognized in some jurisdictions by provisions that stockholders in certain corporations which pay certain taxes shall not be liable to taxation for their stock.

But perhaps it may ultimately be found that this whole theory of offsetting the market value of one or more classes of securities against the value of assets, in order to determine the value of the franchise, is radically defective in some vital element and, therefore, scientifically erroneous. The very fact that Massachusetts has considered it necessary to allow an arbitrary maximum limit, beyond which the corporation tax shall not rise, because a logical working out of the theory would altogether prohibit many lines of business from incorporation, seems to suggest that there is something wrong with the theory. Perhaps the inquiry should be whether the corporation, by the use of the corporate franchise, is earning more than the current rate of interest for the fair value of the assets, and how an apportionment of that excess should be made.

In so far as a particular franchise is of a strictly local nature, such as the operation of a railway in certain public streets, there seems to be very good reason for treating that franchise on a basis similar to the treatment of neighboring landed property, for it is itself in a certain sense a species of landed property, being a qualified right over certain particular public properties, to wit, the public streets. When a specified strip of land is devoted to the general public uses of a public street the particular public interest of taxation in that strip may be said to be merged in the larger public interests for street purposes. When, however, portions of these public interests for street purposes are segregated and turned over to private ownership again as a local franchise, such a franchise is logically analogous to a land title, though only of a strictly limited character, but to that same extent there may be said to emerge a special public interest of taxation over the special land title created.

Such a local franchise, being, therefore, analogous to or of similar nature with a land title, it may with reason be urged that the public interest of taxation over such a franchise should be asserted in a manner analogous to the treatment of neighboring landed property, and for that purpose the franchise should be valued as nearly as possible like an ordinary piece of land. The principle of seeking a value of such local franchise may be fairly admitted, even if the method of estimating that value may be in doubt.

This principle of treating local franchises like land seems to be first prominently brought to the front in the famous Ford Franchise Tax Law of New York, an act which, therefore, marks an advance step of great importance in developing the field of franchise taxes as a just method of public revenue. That act may very likely be found open to some objections in details just as the details in the methods of land taxation are far from satisfactory, but the principle may nevertheless be approved, even if details in application need amending. It would certainly be a singular situation to consider a common private land title in ordinary landed property to be subject to a public interest of taxation while a partial private title in a piece of public property, the street, should exclude all public interest therein. Such a result would be particularly unfortunate in view of the rumors of questionable practices sometimes attending the grant of these privileges. It is of course arguable, and no opinion is here intended on the point, that instead of granting such franchises outright or for a long term, it would be better to keep them in the public hands to let them out at comparatively short terms at a good rental. The point is immaterial in this connection, but serves to show the importance of these franchises as a source of public revenue, and that, although future grants might be restricted by a rental, past grants are out of reach unless we may infer a collateral public interest of taxation.

If such public interest can be justly found in connection with these local franchises, then the question of granting such franchises or keeping them in public ownership or management becomes merely a matter of expediency in view of the circumstances of each particular case, for in either method there is a sufficient security of public control for the public rights involved. The analogy between local franchises and land titles offers a reasonable basis for asserting the concurrent existence of a public interest of taxation over

such franchises, along with the private interest therein, on the ground that they are a special kind of property, rather than on the ground that they are merely property, and obviates all necessity for assuming that in order to protect the public right such enterprises as involve the use of local franchises must be conducted by public ownership or management. Other elements may enter into special cases and furnish apparent reasons for a policy of public ownership or management, but if we recognize the principle of franchise taxation each of such cases can be independently treated as a mere matter of policy for attaining the best results under particular circumstances.

We may freely admit that the policy of public ownership or management of public utilities is in the abstract a perfectly legitimate policy, when circumstances seem to indicate that the particular public body in question is likely to deal with an enterprise in an intelligent businesslike manner with a reasonable prospect of financial success, just as if a private individual were considering the proposition of embarking in the enterprise. It may even come to pass in process of time that such a policy will be generally considered as the most advantageous in well-developed communities, but in view of the frequent absence of genuine businesslike qualities in dealing with public business, it would certainly be unfortunate if there were no reasonable and efficacious middle ground between the extreme of unlimited private control, on the one hand, and unmixed public management on the other. At least one factor of such middle ground seems to lie in the recognition of the public interest of taxation over the local franchises which the public service enterprises so generally require. With such a principle recognized and in use we need have no more fear of the consequences of granting such franchises than we now feel at the grant of private land titles. It is for this reason that we may hail with satisfaction such an act as the Ford Franchise Tax Law, and accord hearty applause to its authors and promoters.

The strictly local franchises, however, do not comprise the whole body of franchise rights which the state may create or recognize, and however satisfactory a system of valuation of a local franchise may be, we need not infer that we must necessarily seek a valuation in order to express the public interest over the franchise. Apparently some franchises are of such a nature that there may

be no certain value ascertainable, aside from the nature of the business itself, so that the public interest may be said to arise not so much from the franchise as from some characteristic of the particular business in its relation to the public. It is obvious that any such public interest may be just as valid when totally impossible of designation by any ascertainable value. In such a case some element of the business as such must be selected as the measure of the tax representing the public interest in that business. It is perhaps to this principle that we may refer certain taxes levied in respect of certain businesses of a semi-public nature, or having an especially vital relation to the public welfare, such as public service undertakings or the banking business. A tax measured by the gross receipts of a public service enterprise may perhaps come under this head, and so also a banking tax measured by the amount of deposits in the institution. Any such tax enters into the operating expense of that business and thus asserts a public interest therein without attempting a valuation of that interest apart from the business. Of course, if the state asserts a larger interest than the business at a particular time can stand, the result is the same as when a private creditor maintains a claim beyond the resources of the undertaking and the business must cease. It is thus of advantage to the state to assert its interest in a cautious though none the less effective manner.

The necessity, however, for the existence of a real public interest, in order to justify such a business tax and relieve it from the blame of an arbitrary exaction, is shown in a recent case in Massachusetts. That was the case of O'Keefe *v.* The City of Somerville, in regard to the constitutionality of an act imposing an excise tax in respect to a business conducted with the accompaniment of giving trading stamps. The case turned on the meaning of the word "commodities" in the taxation clause of the Massachusetts constitution, and in the opinion of the court, by Chief Justice Knowlton, the following passages occur:

"It is not necessary in the present case to determine the meaning of the word 'commodities,' in reference to every possible application of it, but we are of opinion that it is not broad enough to include every occupation which one may follow, in the exercise of a natural right, without aid from the government, and without

affecting the rights or interests of others in such a way as properly to call for governmental regulation." . . .

"Even if the legislature might constitutionally impose an excise tax upon the business of selling articles in the usual way, it has not attempted to do so, and this, if it were construed in reference to the general business of selling alone, would be unreasonable and unconstitutional, because it would impose a tax upon some vendors and not upon others. We are, therefore, brought to the question whether the peculiar way of selling, to which the statute relates, involves a material difference in the nature of the business, such as to warrant the imposition of an excise tax on that account." . . .

"Taking the acts referred to in the broad terms of the description in the statute, they are not dependent for their legality upon the legislative will, nor do they call for legislative regulation. They are performed in the exercise of a natural right, and are not in any sense rights or privileges conferred by law." Accordingly, the court held the tax unconstitutional.

It is seldom that a judicial opinion contains in so few words so broad an applicability. In that case the court was dealing only with a very narrow question of constitutional law in a particular jurisdiction, but the language of the court goes far beyond the confines of mere technical law, and lays down the fundamental principles which in such cases should govern not merely the action of the legislature under a certain constitutional phraseology, but also the action of the state in establishing its constitution and empowering its legislature to act. There must be a public interest in the subject-matter in order to justify the occasion for the tax.

The same principle doubtless should apply in the somewhat analogous case of a mere license tax, that is, there should be some element of public interest in the nature of the business transacted, aside from the mere industry of the manager of that business. Perhaps in one sense a license tax may be considered as a species of franchise tax, provided this element of a public interest is present, but if it can be called a franchise tax we must use the term as applying to a franchise of totally uncertain value apart from the skill of the person who uses it, and we must recognize that when the element of public interest is present to justify such license tax, the amount must depend on the state's discretion by general laws to meet the conditions of varying times and places. Thus the

principle of requiring a public interest to justify the tax will not hamper the action of the state when the public interest is truly present, although there may always be wide room for discussion as to any particular method for applying the tax.

Now it is the indubitable presence of this element, a public interest, that makes corporate franchises a just field and source of public revenue, not because they are corporate, as heretofore said, but because they are special privileges existing by the action or recognition of the state. Much of the popular desire to hamper the operation of corporate enterprises is founded on well-grounded resentment at the misuse of corporate power, but in so far as such desire is founded solely upon such resentment such an attitude is unintelligent, unscientific, and unjust. A more rational view is to assert to a reasonable and equitable extent the public interest over the franchises which such enterprises must generally employ and which furnish so large a basis for their prosperity. When this policy is pursued, and so far as it is pursued, these special privileges are no longer a drain on the community for the benefit of a few merely, but become a species of joint enterprise in which the benefit to the community is concurrent with the opportunity for private benefit therein. By this the prosperity of private industry is consistent with the public rights, and the public rights are found in cooperation with private industry.

The policy of franchise taxation is, moreover, not only reasonable in itself, but is the complement and corollary of the doctrine herein asserted that the merely representative securities of an enterprise do not offer a just reason for the taxation of the holders for the ownership thereof. The eagerness to impose taxes on the owners of intangible personal property by means of drastic and oppressive laws is largely due to the feeling that somehow, somewhere, in the shuffle of corporate enterprise, something of value has been subtracted from the community without just recognition of public rights, and that any attack on the security holders as the ultimate beneficiaries of the enterprise is, therefore, a worthy assertion of the public rights. This feeling entirely overlooks the difference between the investors individually and the corporate entity of the enterprise. Any injury to the public in any particular case is the act of the corporate whole as a body, and, therefore, the remedy should be found in the enterprise as a whole in the hands of the

corporate body, and not in the indirect benefits in the hands of the security holders distributively. This remedy the principle of franchise taxation offers, for it is precisely at the point of abuse of franchises that the real ground of just complaint against the corporation lies, and just as a parcel of land as a whole furnishes the sole and sufficient basis for a just tax covering the land as a whole, regardless of the number or manner of separate interests into which it is divided or to which it furnishes the security, so the corporate franchise as a whole in the hands of the corporation furnishes the sole and sufficient basis for a just tax covering the enterprise as a whole regardless of the number or kinds of securities which representatively depend on that franchise for a portion of their value.

The principle applies whether or not the stockholder or other security holder resides in the same jurisdiction where the corporation is organized or does business, for the justification of the tax in the case of a corporate franchise, as in the case of a piece of land, depends not on the personal accident of the ownership of the ultimate benefit to be derived, but on the presence of some public interest in connection with the subject-matter. In the case of land such public interest obviously belongs to the jurisdiction where the land lies. In the case of a franchise it should be equally obvious that the jurisdiction entitled is the jurisdiction under which the corporate body as an entity exercises its corporate privilege, and that this is a claim respecting the franchise in the hands of the body, and not justly a claim respecting the person of the security holder.

Accordingly, when a corporation organized in one jurisdiction is admitted or permitted to do business as a body in another jurisdiction, such body as a foreign corporation is exercising a corporate privilege in the permitting jurisdiction, and such a privilege may justly be in a certain sense esteemed a franchise involving a public interest of taxation as truly as the franchise of a domestic corporation. Nor should there be any practical difficulty about discovering and reaching the operation of such foreign company, for the recognition of the foreign corporation, as a corporate body, is dependent entirely on the permission of the permitting state, and such state may reasonably declare that unless the foreign body declares its corporateness and takes out a license under local law, the acts of its agents in that jurisdiction shall be considered not the acts of

the unrecognized corporation, but the acts of the agents personally, who shall be personally responsible as agents for a non-existing principal. In important enterprises, therefore, the foreign corporation will be advantaged to declare itself in order to employ competent agents.[10]

On the other hand, this principle of veto over foreign corporations involves the corollary that when the securities of an enterprise are held by the citizen of a state wherein the enterprise is neither incorporated nor does business, as the public interest of franchise taxation belongs solely to the jurisdiction having to do with the franchise subject-matter, so the ownership of the citizen in the securities of such outside enterprise is as entirely devoid of any public interest of his state as in the case of a domestic body operating under local laws, for the interest of the state over foreign bodies must justly be limited to such bodies as seek to exercise corporate privileges within the jurisdiction, and this interest exists as between the state and the corporate body, not as between the state and holders of representative interests or securities in the enterprise, and to condemn an inhabitant to loss or charges for the ownership of an interest in a subject-matter wherein the state has no just public interest is distinctly to assert a proprietary claim over such person. Thus the principle of franchise taxation, both as respects domestic and foreign bodies, stands with and reinforces the doctrine of the just completeness of the private ownership of merely representative interests as hereinbefore set forth.

The impersonal character of the principle of franchise taxation as a claim belonging justly only to the jurisdiction under and by virtue of which the special privilege is exercised may be further illustrated by a consideration of certain kinds of privileges in a federally organized country. In the United States of America, for instance, patents and copyrights are matters of federal law. As these may be called special privileges under the law of the United States, it might be considered reasonable for the United States to make the continued existence or exercise of these powers conditional on the payment of some revenue charges. Many countries demand heavy annual payments to keep their patents alive, and the justification for such a policy must be sought in the theory that

[10]See an article in The Law Quarterly Review of London, for April, 1907, on the status of foreign corporations, by E. Hilton Young.

patents are special privileges under the law, but the theory equally requires that the public interest over the privilege must belong solely to the jurisdiction by which the privilege exists. Thus the federal government granting patents might be said to have a just ground of taxation therein, but not so the separate states of the Union, for the patent exists irrespective of state law, and the state has, therefore, no just interest therein. So, too, the principle requires that any government should refrain from taxing an inhabitant for the ownership of a foreign patent, for, although a privilege, it is so by virtue of another jurisdiction.

It is also to this principle of jurisdiction that it would be necessary to look for the justification of the recently proposed federal license for common carriers in interstate commerce, since interstate commerce is within the field of the federal government as paramount over the separate states. The point of jurisdiction marks the boundary of the possibility of a just public interest, but jurisdiction alone is not sufficient justification. It must be jurisdiction over a subject-matter which, by its nature, involves a public interest, and not a jurisdiction over the person in respect to subject-matters, regardless of the existence of the public interest; and just as land taxation finds and must find its justification in a public servitude over the land, so franchise taxation must and can find its justification in a public interest involved in the nature of the subject matter, and not in the assertion of servitude over persons.

Chapter VI

INCOMES IN RELATION TO TAXATION

We may divide private property interests into two general classes: first, interests in or over tangible things comprising on the one hand lands and on the other hand merchandise, the product of human labor; second, interests of a purely intangible character, comprising on the one hand such artificial things as franchises and on the other hand the many kinds of merely representative interests. In a certain sense, of course, all property rights are intangible, whether they relate to tangible or intangible subject-matters, but for convenience we may materialize the ideality and speak of the first class alone as tangible property and the second class as intangible. We have also seen, as heretofore set forth, that each of the above classes may be subdivided into two groups, one group comprising property over which there is a just public interest of taxation concurrent with the private ownership thereof, that is, lands in the first class and franchises in the second; and the other group comprising property over which the private interest is justly exclusive, for which, therefore, there is no just public interest of taxation on account of the ownership thereof, that is, merchandise in the first class and representative interests in the second. It also appears that the public interest of taxation, when it exists, is so only by virtue of the nature of the subject-matter, and not justly by virtue of any proprietary claim over the owner, so that while the existence of the public interest is essential to the just assertion of the tax in the one case, so the non-existence of the public interest in the other case requires that the owner shall not be personally taxed for such ownership, for such a tax in the absence of an antecedent public right in the subject-matter is a proprietary claim over such owner.

The occasion for taxation is, however, sometimes, in fact frequently, asserted, not on account of the mere fact of ownership, but on account of the benefit of ownership, that is to say, on account of the fact that a certain piece of property produces an income. We

must carefully discriminate, however, between a tax literally "on" a particular property, but measured by the income capacity of that property, and a tax on an owner because of income from that property. If, in regard to a particular subject-matter, as a piece of landed property for instance, the public interest of taxation justly exists, then the use of the income capacity of that property as the measure of the tax is merely a detail of policy. It may not be the best policy to assess land by its income rather than its capital value, but it is entirely within the scope of the public servitude of taxation over land thus to do, provided the tax is founded on the impersonal charge on the land and not on an asserted personal charge on the owner. So, too, it might possibly be well to consider income capacity in corporate franchise taxation, provided it is asserted under the public interest of taxation in the franchise and not as a servitude over the owner. But when we come to the case of a tax imposed on an owner because of the income of property, regardless of the existence of a public interest of taxation for the taxing government in or over the source from which the income is derived, we have a very different question; namely, whether a tax imposed on the owner of property because of the benefits of the ownership thereof, is the same as a tax imposed on the owner because of the ownership.

The question was discussed by the Supreme Court of the United States in the famous income tax cases in 1895, and formed the basis of the opinion of the majority of the court against the constitutionality of the federal income tax of 1894. The constitutional point turned on the technical question whether an income tax was a "direct tax," within the meaning of the American Constitution, as distinguished from "duties, imposts, and excises." The question of the directness of an income tax under the terms of any particular constitution is entirely immaterial to the present discussion of the justness of such a tax, but the question on which the legal point was based by the majority of the court is of illuminating value.

In reaching the conclusion in the first income tax case, that as to rentals, the tax was the same in result as a land tax and, therefore, direct, Chief Justice Fuller referred to Coke as follows (157 U. S. Reports, at page 580): "As, according to the feudal law, the whole beneficial interest in the land consisted in the right to take the rents and profits, the general rule has always been, in the

language of Coke, that if a man, seized of land in fee, by his deed granted to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery *secundum formam chartae,* the whole land itself doth pass. For what is the land but the profits thereof?" And on the question before the court the Chief Justice said: "An annual tax upon the annual value or annual use of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income."

According to this doctrine of the majority of the court the imposition of an income tax for the rent of land is the assertion of the right to tax the land. It follows that just as the justification of land taxation must, according to these pages, be found, and in fact is found, in a public servitude of taxation over the land itself, and not in the assertion of a proprietary claim over the owner, so the imposition of a tax measured by the rental of land must rest on the public interest in the land and not on the assertion of a personal responsibility of the owner. The doctrine was carried still further by the court in the second income tax case and was applied generally to all property and the income thereof, whether the property is of such nature, as land, where a capital tax may rest on a public interest in the subject-matter and be, therefore, enforced impersonally against the property, or of such nature as in the case of personal securities that a capital tax must generally be a personal tax against the owner, so that in all cases the imposition of an income tax on the owner because of the benefits of ownership is in substance the same as the imposition of a tax because of the ownership. It follows that where the source of the income is property involving a just public interest of taxation for the taxing government, a tax on the owner for the income is open to the same objections as heretofore made against a personal system of land taxation as distinguished from an impersonal system, while in the case of property involving no just public interest of taxation an income tax on the owner is an attempt to do covertly that which ought not to be done openly. The following language of the Chief Justice for the majority of the court, in the second income tax case, is very comprehensive (158 U. S. Reports, at page 627):

"The constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census; and, in the light of the circumstances to which we have referred, is it not an evasion of

that prohibition to hold that a general unapportioned tax imposed upon all property owners as a body for or in respect of their property, is not direct, in the meaning of the constitution, because confined to the income therefrom?"

"Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

"There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property and the property itself.

"Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and the income therefrom."

The income tax cases, as before said, turned on a technical point of constitutional law which might be decided either way without affecting the justness or the unjustness of an income tax, for the court was not dealing with such a question, but only with the meaning of the language of the constitution. But the reasoning of the Chief Justice on the preliminary point of identifying a tax imposed because of the benefit of ownership with a tax imposed because of ownership, seems to the present writer fundamentally essential, and, therefore, the condemnation or justification of an income tax in respect of property income must rest on the principles enunciated in the foregoing discussion of taxes on or on account of property itself.

It is obvious that an income tax is not literally "on" the income, for an income is not a distinct entity, but rather a description of the manifestation of the source from which it is derived as respects the person of the owner. In strict accuracy the net amount of

periodic income from a piece of property is not determined until all periodic charges incident to the ownership of that property are paid, and, therefore, if there is an income tax the net income is not determined before the payment of the tax, but only afterward, and that only is income to the owner which comes to him for his own use or remains after the tax is paid. An income tax, then, is not strictly "on the income," but is a personal tax on the owner on account of or because of the income from a certain source.

It is sometimes contended that a person's general income is a distinct entity, existing in itself without reference to any source of income and apart from the person receiving the income. It ought to be manifest that an income cannot be derived unless from a source in either property or labor and skill, and that it is an income as to a certain person because it comes into the hands of the recipient for his own use. If, then, the organized state, by its governmental instruments, asserts the claim to divert a person's income to its own uses at its own arbitrary choice, merely because that person has received so much income, such a state or government is thereby asserting a proprietary claim over such person for the disposition of his resources to the use of a master, unless the person in receiving the income is committing a reprehensible act by such receiving, or is thereby invading the antecedent rights of the state or some other person, natural or juridical, in, over or in respect to the source whence the income flows.

A man's "general income" is only a general descriptive term for a multitude of benefits combined in one group, but as a whole it consists of all its parts, and the income from any particular source does not lose its own characteristics by being described with other things. A general income tax is, therefore, a personal tax in respect of each and every item of source, from which the income derived is required by the law to be lumped in the general income, as well as if specified as a tax for each particular item of source in property or labor. This personal quality of an income, as a manifestation of the source in respect to the person, was emphasized by the Hon. George F. Edmunds in the course of his argument on the first income tax case, against the constitutionality of the statute, in the following passage (157 U. S. Reports, at page 486):

"A carriage is a thing which we have an idea of as a definite and complete thing, as distinguished from the personality of the

owner. Can you have any such idea about an income? I take it not. Therefore, whatever we may say as it respects a tax upon a thing which moves about as a physical object, it is a different idea and a different thing to the conception of a tax upon a person, and that is all this income tax is or professes to be—a tax upon a person, because of a particular circumstance inseparable from him. It is curious that in old English times, and in the law dictionaries, even since the constitution was formed, an income tax was described as a capitation tax imposed upon persons in consideration of the amount of their property and their profits." And on page 488 of the same case Mr. Edmunds describes an income tax as "a tax upon the person in respect of his income." Continuing (page 492), Mr. Edmunds makes the following characterization of an income tax:

"The income of a man is inseparable from him. It is as inseparable from a man as his character is, or his name. It is there. It is personal. It begins and ends with him. It was for that reason that I read the definitions in existence at the time this constitution was made as a capitation tax included an income tax. It is an inseparable quality, idea, entity that could not be grasped by the human mind otherwise than in connection with the person."

In fact, the personal quality of an income tax was admitted by the government in the course of the argument of the first income tax case by Assistant Attorney General Whitney, who (at page 473), in the following passage, seems to have sought to define the words "direct tax," under the constitution, as substantially meaning in reference to property an impersonal tax on a particular thing. "Direct taxes," said he, "by a more practical definition, would mean taxes falling directly upon the thing taxed and, at least primarily, collectible out of it. Familiar instances are poll taxes, and in many states land taxes chargeable only against the land and not a charge against its owner at all. An income tax is less direct than a carriage tax, which may be made to fall directly on the carriages by distraint; or even than an import duty upon goods, which are seizable for non-payment of the tax. It is not a tax upon property at all; it is a tax not on what a man now has, but on himself, measured by what he did have, although most of it he may have already spent."

Here we have the personal nature of an income tax stated in

the baldest terms by the advocate of the government as a step in his definition of the constitutional phrase "direct tax."

If the Assistant Attorney General's definition of the constitutional term "direct tax" had prevailed it would not have affected the general question of the justness of an income tax, but would itself have depended on the personal quality of an income tax. By such a definition of the words "direct tax," the constitutional clause which says, "No capitation, or other direct tax, shall be laid, unless in proportion to the census," would practically have been interpreted as if reading in the following manner, since a capitation tax or poll tax seems to be unquestionably a personal tax, namely, "No *personal* capitation, or other *impersonal* tax *on property,* shall be laid, unless in proportion to the census." This would have been a contradiction in terms, or else it would have been manifestly strange to require, aside from a poll tax, only an impersonal tax to be apportioned according to the number of persons, but the court, by a majority decision, held that an income tax for property income was a direct tax although personal, perhaps because personal, and declared the law unconstitutional.

The personal quality of an income tax may consequently be further examined in connection with its effect on the rights of the person affected in reference to the various sources of income and in reference to the person himself. Take the case of income from land. It is freely admitted herein that in assessing the land itself under the public servitude of taxation thereover, the use of the income capacity, or the "outcome" of the land, as a measure of the tax, is within the scope of the servitude, if at a particular time and place such a policy seems advisable. But the priority of the public servitude over the land implies that all the public revenue from a particular piece of landed property shall be levied under and by virtue of the public servitude and not distributively on the persons who own the property or hold security therein. If, then, the government, neglecting its primary interest over the land, in whole or in part, seeks to enforce a claim over the owner personally for the income, it is rejecting a sufficient basis for land revenue in favor of a less efficient procedure.

If, on the other hand, the government considers that the public servitude against the land has been enforced to as great an extent as is publicly expedient at a given time, and then proceeds to tax

the owner extraneously to the land on account of the income as a personal incident and benefit of ownership, it is doing under pretense what it refuses to confess, and is denying the right of the owner to all of the income that remains after answering the public servitude over the land. If, in addition to neglecting the public servitude over the land and pursuing the owner personally, the government graduates the tax according to the accident of the size of the owner's income, it is violating the fundamental basis of its public interest in the land by making the tax depend, not on the characteristics of the property itself, but on some extraneous personal incident of the owner, so that from the same land in different ownerships the government would claim a different amount of tax. Such a tax is not only in derogation of the right of the owner, but also in derogation of the real rights of the government itself.

Again, it often happens that the owner of a particular piece of landed property resides in a different jurisdiction from that where the land lies. Should the difference in residence from the jurisdiction of the land subject the owner to an additional tax? The taxing of the owner for the benefits of ownership is the same as taxing him for the ownership, and the justification of land taxation rests on the public servitude in the land, and not on a claim against the person. That public interest in the land necessarily belongs exclusively to the jurisdiction where the land lies, and not to the jurisdiction where the owner resides, so that the imposition of a tax on the owner for the benefits of the ownership of land outside of the jurisdiction is in derogation of the principle that the public interest of taxation in land belongs to the jurisdiction where the land lies, and such a tax is a denial of the right of an inhabitant to own and enjoy in his own right land which may lawfully belong to him in another jurisdiction under the laws thereof. Such a denial is also a claim by the government that the inhabitant must hold the benefit of his foreign land, not in his own right, but primarily in the right of the government where he lives, and is essentially the assertion of a proprietary claim by the government over such inhabitant.

The same principles are also applicable to the other great category of property involving justly a public interest of taxation, namely, franchises. Although the general practice of American states in levying franchise taxes out of a corporate enterprise is to seek first to establish, by some theory or other, a capital value of the

franchise, yet it may perhaps be that in relation to some kinds of franchises not of strictly local nature, it would be found advisable to measure the franchise by the amount of income which the enterprise as a whole is earning by the use of the franchise, over the current rate of interest, or by the amount of income which the enterprise is turning over to its creditors or security holders, as the "outcome" of the enterprise, on the theory that the use of the franchise imparts an additional facility of use to all the assets of the enterprise. But in using such a measure it should be carefully borne in mind that it is a measure of the public interest in the franchise as a whole, as a part of the entire enterprise in the hands of the body or corporation controlling the business, and not a measure for attacking the creditors or security holders personally for the purpose of depleting their interests distributively. Of course, if a sum of money is taken away from a corporation, there is just so much less to be distributed to the security holders in the aggregate, but if this is charged on the enterprise as a whole it is a part of the expense of running the business, and its effect on the security holders will, like any other expense, depend on the nature and priority of their securities under the contractual terms of their issue.

Now, just as the right of the government to land taxation rests on the public servitude of taxation in the land, and the existence of the public interest requires that all the public revenue from a particular piece of landed property must justly be levied under and by virtue of such public interest and not by extraneous or collateral attacks on the owner or distributively on the persons whose interests collectively make up the ownership, so in the case of a business enterprise employing a franchise which involves a public interest of taxation, that public interest is justly against the franchise as a part of the enterprise, and the existence of that public interest requires that all the public revenue which may be levied because of that franchise should justly be charged against the enterprise as a whole in the hands of its corporate or aggregate controllers and not distributively against the persons whose beneficial interests collectively make up the ultimate beneficial ownership. Therefore, if the government neglects its fundamental public interest over the franchise, and pursues the ultimate beneficial security holder for the benefits of his security as producing income, the government is

disregarding its primary interest in the subject-matter and relying on a pretended claim against the person, and, moreover, is ignoring an effective resource in favor of a defective procedure.

On the other hand, if the government considers that the enterprise as such has already been required to pay all that, under the circumstances of the time and place, the enterprise ought to be asked to endure, and then proceeds to tax the persons entitled to the ultimate benefits of the enterprise for their income therefrom, it is doing by stealth what it confesses to be wrong when done openly, and is denying the right of the ultimate benefit holder to all of the benefits that remain after the enterprise as such has satisfied all reasonable public charges against that enterprise as a part of the expense of the maintenance thereof. If, in addition to neglecting the public interest over the franchise employed by an enterprise, the government graduates the tax according to the accident of the size of the person's income, it is violating the fundamental basis of its public interest over the franchise by making the tax depend, not on the characteristic of the enterprise itself, but on some extraneous incident of the person entitled to the ultimate benefit, so that from the same enterprise the government would claim a different amount of tax, according to the accidental difference in the destination of the benefit. Such a tax, as well in the case of a franchise as in the case of land, is not only in derogation of the right of the person to his benefit, but also in derogation of the real rights of the government itself.

Again, it often happens in the case of an enterprise employing a franchise, as well as in the case of land, that the person entitled to the ultimate benefit resides in a different jurisdiction from that jurisdiction under which the franchise exists, and again the principles of franchise taxation forbid that the residence of the security holder in a different jurisdiction should result in any additional tax for the benefit of receiving income by his security. The fundamental basis for franchise taxation is the public interest in the franchise as a special privilege created or existing by the recognition of some organized state, and that public interest necessarily from the nature of the case belongs exclusively to the jurisdiction maintaining the special privilege, and not to the jurisdiction where some person entitled to some ultimate benefit after the expenses of the enterprise are paid may happen to reside. Therefore, the imposition of a tax on

such a person for the income or ultimate benefit of a franchise existing under another jurisdiction, is in derogation of the principle that the public interest of taxation over franchises belongs to the jurisdiction of the franchise, and such a tax is a denial of the right of an inhabitant to receive to his own use and enjoy in his own right the benefits which may lawfully flow to him from a franchise under another jurisdiction and the laws thereof. Such a denial is also a claim by the government that the inhabitant must hold his foreign benefit, not in his own right, but primarily in the right of the government where he lives, and is essentially the assertion of a proprietary claim over such inhabitant.

The same principle of jurisdiction requires that when a corporate enterprise employs franchise privileges in two jurisdictions it should not be taxed in one jurisdiction for the franchise which it enjoys in the other jurisdiction, nor in the second jurisdiction for the franchise in the first, but each jurisdiction should scrupulously limit itself to its public interest over its own franchises. Accordingly, if the income earned by the use of the franchise is taken as the measure of the franchise tax, the income which accrues under the foreign franchise should be excluded from the measure. For, if in any particular case a foreign franchise or special privilege of any kind should happen to be vested in a particular natural person, the only jurisdiction justly entitled to a tax by its public interest over the franchise would be the jurisdiction where the franchise or privilege exists, and not the jurisdiction of the residence of the owner, so that neither for the ownership nor for the benefits of ownership should such owner be made liable in his own jurisdiction, as that would be a denial of his right to the benefits of his foreign privilege, and the assertion of a proprietary claim over him to make him hold the benefits thereof primarily in right of the government.

Thus we see that in both the great categories of property involving justly a public interest of taxation, namely, lands and franchises, the use of the income capacity or "outcome" of the subject-matter is within the scope of such public interest for a measure of the enforcement thereof against the subject-matter, but not as a means of depleting the interests of the beneficiaries distributively; that this public interest belongs solely to the jurisdiction of the subject-matter, and that the use of the income capacity or "outcome" as a measure of such public interest likewise belongs

to the same jurisdiction exclusively. So that to assess personally the beneficiary of either lands or franchises for the income thereof to himself in the case of such property within the jurisdiction is to neglect the real interest of the government over the subject-matter, and in the case of such property out of the jurisdiction, is in derogation of the true basis of the public interest of taxation, is a denial of private right to the benefit of private property, and is, therefore, a servitude over the person of the private inhabitant.

We may perhaps now consider as respects income the position of the two great categories of property over which, as herein contended, there is justly no public interest of taxation for the ownership thereof, namely, first, merchandise as the product of human labor, and, second, merely representative interests or securities. Obviously the right to the ownership ought to draw with it the right to the benefits of ownership, and if these pages are sound in asserting that the private right over the products of labor and over representative interests is justly exclusive of any public interest of taxation for the ownership thereof, and if the doctrine of the majority of the Supreme Court is sound, that to require the payment of a tax for the benefits of ownership is the same as to require the payment of a tax for the mere fact of ownership, then the imposition of an income tax on a person, for the income from property not involving a public interest of taxation for itself, is a denial of private right; for the right to the benefits of an exclusive ownership is the right to all the benefits of ownership and not merely the right to so much of those benefits as may remain after a power external to the person has satisfied itself for its extraneous demands in the absence of any compromising or reprehensible conduct by the owner.

Take the case of merchandise, the product of human labor, for instance. The right of the producer to the whole of his product remaining after paying the expenses of production, including therein the payment for the use of the land needed in such production, both as respects the private interest of the landowner and the public servitude of taxation in the land, is the foundation of the exclusiveness and completeness of the private interest in merchandise as produced by human labor, whether that merchandise is in the hands of the original producer or in the hands of a purchaser; for the right of the producer to the whole involves the right to transfer

as large an interest to the purchaser in order that the producer may obtain the full equivalent and benefit of his entire ownership.

The exclusive private right in the ownership of this species of property implies also the exclusive private use. We are not speaking here of any attempted use which may encroach on the pre-existing rights of others. Against such an attempted use restraint may undoubtedly be employed with justice. Nor are we speaking of any particular use which requires the employment of a special privilege under the law. For the employment of a special privilege the law, as heretofore said, may justly impose conditions of some kind. What we are speaking of is simply the private use unconnected with the rights of others or with any special privilege, as, for instance, to eat the crops which one has raised, to wear the clothes which one has made, or to keep one's products as a provision for future needs. Such a simple dissociated use is one of the necessary qualities or incidents of ownership, one of the veritable ingredients of property, the fundamental benefit and purpose of property; for, to paraphrase Coke, what is property but the use thereof. If, now, the owner entitled to the use of property sees fit to forego or postpone the primary use of the property by himself and to permit its use for a time by another in return for a compensation, the full unqualified right to the primary use implies an equally full and unqualified right to the compensation, as a secondary use of the property.

The principle is the same whether the owner receives his compensation once and for all as to any particular article or in periodic instalments, for in either case it is compensation for the deferred enjoyment of that use to which he is fully entitled. It follows, therefore, that just as in the case of land, the owner is justly entitled to all of the income remaining after satisfying the just public servitude of taxation in the land, so in the case of merchandise, in which, as the product of human labor, there is no just public interest of taxation, the owner is justly entitled to all of the income therefrom without any deduction or counter penalty whatever imposed by reason of the mere fact of such income as a benefit of ownership. To impose a tax upon the owner of the products of labor because of the receipt of income from such property is, therefore, to assert a public interest where none exists in the subject-matter and is a denial of the exclusive right of the owner in the

property from which the income is derived. Such a denial is, therefore, the establishment of a servitude over such owner.

But comparatively only a small proportion of property income flows from the mere compensation for the use of tangible movable products. The great mass of personal property paying income is of the intangible class and consists of merely representative interests or claims for ultimate compensation out of some particular property, business, or enterprise, or for some service or benefit to some person who has entered into contractual relations as to the compensation therefor in the nature of a debt or a share in an undertaking. These representative interests or securities are the claims of the holders for some ultimate compensation or benefit, and the periodic income therefrom is the periodic compensation for the postponement of the ultimate enjoyment of the capital claim represented. Now, it is obvious that the current value of a representative security depends on the assumption of value in the entity or enterprise by which it is supposed to be secured, and with this principle is connected the doctrine herein asserted that the private right in the ownership of representative interests excludes any public interest of taxation imposed distributively on the owners for the ownership thereof to the depletion of their private interest therein. So far as the entity or enterprise embodies the use of land or franchises involving justly a public interest of taxation such use must necessarily be subject to answering the reasonable charges of such public interest as part of the expenses of the enterprise, but equally does it follow that after fully discharging for any particular period the charges of the public interest of taxation over such of the assets as involve such public interest the whole of the balance of the earnings for that period belongs to the uses of the enterprise and its beneficial owners, to be distributed by or among them according to the terms of their several contractual claims against the enterprise as respects amount, time and priority. Hence the imposition of an income tax on the security holders because of income received as periodic compensation for the postponement of the enjoyment of their ultimate capital claims is a denial of the exclusive right to the periodic benefits of an exclusive ultimate right, for it amounts to saying that after the enterprise has paid all that is justly chargeable against it by the public interest of taxation, those beneficially entitled to the balance may be required to pay for receiving that to which they are fully entitled.

The principle applies not merely to the interests of those who hold the gross or uncertain claims to the residue of profits after the payment of expenses, but also to the interests of those who hold simply claims in the nature of debts for certain amounts or limited prior charges with a fixed and limited periodic compensation in the nature of interest or a net income. If such claims in any particular case have any market value, it is because of some supposed value in the entity or undertaking by which they are secured or in the credit of the debtor who has assumed the obligation. Such claims must obviously be realized out of the proceeds of the undertaking or the property of the debtor, and from an economic point of view are just as truly embarked in the undertaking or constitute a part of the ultimate right in the property of the enterprise or debtor as if they were generally uncertain shares instead of certain charges. In the case of debts, as well as in the case of shares, they are claims for ultimate compensation out of the subject-matter to which they must look for value, and the periodic income which they carry is the periodic compensation for the postponement of the ultimate enjoyment of the capital sum represented by the current value of the claim.

If the holder of funds for investment does not wish to embark generally in the hazards of an enterprise for the purpose of receiving the uncertain general returns of the enterprise, but wishes rather to embark only so much capital as he considers likely to be certain of a return, and if, foregoing the general chance of fortuitous gain, he prefers to have a prior claim for a fixed amount at interest for a certain time, or a prior claim for a fixed income, such interest or fixed income is simply the periodic compensation for the postponement of the enjoyment of his capital investment. It is all the more surely mere compensation from the fact that it is fixed to a maximum amount, since this fixing in one direction implies that it should be considered as fixed in the other direction, and that as the recipient by his contract cannot demand more so, too, he should not be put off with less, but that he is justly entitled to each and every part thereof to his own use. The private right to merely representative interests against an enterprise is justly entire and exclusive because they are claims for compensation to which the holder is justly entitled in full for property or services, real or assumed, in the enterprise or entity, and since such claims derive

their market value from their reliance on a source which, so far as it involves justly a public interest of taxation, like land, must respond to that taxation in the proper jurisdiction, and so far as it involves justly no such public interest of taxation, like merchandise, the product of human labor, ought not to be made covertly the occasion for a tax, therefore, the private right to the income from representative interests should be considered entire and exclusive as the periodic compensation for the postponement of the enjoyment of an ultimate compensation to which the private right of ownership is justly exclusive, whether such income is gross as the uncertain dividends from general shares, or is net as interest on a debt or a fixed and limited prior charge.

Take the case of a simple unsecured debt. It is not a tangible thing in itself. It is merely an intangible claim to an ultimate benefit, even if evidenced by a tangible document. It represents an expectation of value to which a claim is asserted. If the claim is justly valid, then the right to which the creditor is justly entitled is the whole claim, according to the terms of the transactions by which it arises, and we have therefrom the principle herein asserted as to the exclusiveness of the private right of ownership over merely representative interests. The consideration, cause, or occasion for the debt may be the sale of some species of property or the rendering of some service of employment in connection with the transaction, and the debt created represents the compensation.

If the consideration is merely nominal, the debt represents a claim none the less to a benefit out of the general property of the debtor. In any event, it represents a compensation to the creditor for value or a benefit by grant of the debtor, and such compensation or benefit in effect constitutes part of the private interest in the enterprise or property to which it must look for fulfilment. So far as such enterprise or property is of a nature to involve a public interest of taxation that enterprise or property should answer in the appropriate jurisdiction, but only to that extent. As the debts chargeable must look to the private interest in the property or enterprise, the whole of any debt may be considered as falling within the sole field of private right, and the right of the creditor to the whole debt is, therefore, justly exclusive of any public right of taxation. Now, since the periodic interest accruing on a debt represents the compensation for the postponement of the enjoyment

of the ultimate compensation or benefit to which the creditor's right is exclusive, such periodic interest should equally be exclusive of any public claim of taxation for the receipt thereof. The imposition of an income tax on the creditor for the receipt of interest on his debt is, therefore, a denial of his complete right to the whole periodic compensation for the postponement of the enjoyment of an ultimate compensation or benefit to which he is in full justice completely and exclusively entitled. It is a proprietary claim by the state over the creditor in that it spontaneously, for the benefit of the state, requires the creditor to receive primarily in right of the state, a benefit to which he is entitled in his own right, and is thus the establishment of a servitude over the person.

The principle is the same if the debt is secured by the pledge or mortgage of some specific piece of property, for then the security of the debt is simply pointed out as a prior charge on the private right to such property, and as such prior charge it becomes a part of the total private title to the property. If the specific property is of such character that the private right should justly be considered exclusive, such exclusiveness should not be lessened by the apportionment of the totality among two or more by priority. On the other hand, if the property is of such a nature as involves justly a public right of taxation therein, as, for instance, land, then the priority as part of the private title is equally assisting to maintain taxation over the entity as a whole, as well as if the private title were held in one right instead of several consecutively. In either case, of security, as well as in the case of an unsecured debt, the accruing interest represents compensation for the postponement of a justly exclusive enjoyment, and is itself justly exclusive, so that the imposition of a tax for the receipt of interest from a debt secured by property over which the taxing government has no just claim of taxation is the imposition of a tax covertly where there should justly be none openly, as the denial of the exclusiveness of the creditor's right to his claim and the security; while the imposition of such a tax where the security itself involves a just right of taxation is the imposition of a tax in addition to the limits of such public right. In either case it is a denial of right to the creditor and a derogation from the principles on which the government must base its just right of taxation over certain subject-matters, since it is the establishment of a servitude over the person rather than the thing.

The same principles seem also applicable to the consideration of gains received from the sale of property at an advance over the price of purchase. This is another method of enjoying the advantageous ownership of property aside from the mere rental for the use of property or the postponement of the enjoyment of an ultimate benefit for a periodic compensation. In the case of a sale at an advanced price, if the property is of such a nature that it involves justly a public right of taxation, as land, it ought to be obvious that all advantages in the value of the private title, aside from the public right itself over the property, should belong to the owner of the private title. If he exchanges his title for a price, the whole of the price should belong to him, regardless of the fact whether or not that price is more than the price at which he obtained it, for the existence of the public right of taxation over a particular kind of property rests justly on the nature of the property itself, and not on the collateral personal accidents or situations of the owner, while the risk of loss by depreciation or accident during the holding of the property implies that the chance of gain should go with it. Moreover, if the advance price represents a permanent increase in value, such value will proportionately increase the value of the public interest therein, whether the owner sells the property or not. The fact of sale is a mere personal incident which occurs entirely apart from the public interest of taxation over the land, and the gain from such a sale is merely a comparison with another previous personal incident. On the other hand, if the property sold is of a kind not justly involving in itself a public right of taxation in reduction of the exclusiveness of the private right over such property, then the benefit of the sale should also be exclusive, as it represents the equivalent for an exclusive right. In either kind of property the fact of the sale depends somewhat on the owner's private judgment, so that the levying of a tax upon him for making a gain by that judgment is not merely a tax on account of a mere personal incident in the ownership of property, but a tax for using his judgment advantageously, and, therefore, implies a proprietary claim by the government over such owner as an assertion that a man is not justly entitled to the benefits of his own good judgment.

Now, the drawing of gain from the judicious exercise of one's judgment is only one manifestation of a general class of gains which may be grouped under the general head of gains from the

person's own efforts, as the reward or compensation for the labor of his muscles, the skill of his hands, or his intelligence in conducting affairs. If there is any class of gain to which a man may justly claim to be entitled, surely it is the gain from his own labor, skill, and intelligence. Such a right is the fundamental inducement to efficient labor and industry of every sort. It is the recognition of the man's own life. Of course, it must be assumed that we are not considering the case of a man who is using his labor, skill and intelligence to undermine or destroy the rights of others, as the burglar or the swindler, but are considering only the case of a man who, without encroaching or wishing to encroach on the rights of others, is seeking an economic purpose in peaceful industry. Of him we may confidently assert that whatever disposition should be made of his gains from property or special privileges, or industries of some public character, so much of his gain as is attributable to his peaceful industry by labor, skill or intelligence, justly belongs to him entirely, to his own sole use and benefit as a matter of right and justice. If now the organized state assumes to interfere with a man and require him to pay a penalty for the reason that he has by his own efforts acquired some gain, it is in effect arbitrarily diverting his own life away from himself in denying his right to the compensation for his own efforts. Such an exaction is essentially an appropriation of the man's labor, skill and intelligence, and is the imposition of a servitude upon him. The principle is the same whether the person is in business for himself and is reaping the uncertain rewards of his general industry, or has hired his efforts out for a compensation stipulated in advance. In either case his right to his own life should carry an exclusive right to the earnings of his life's efforts.

It may, perhaps, be objected that the state, in exacting a charge for a man's personal earnings, is only asking compensation for the protection afforded him by maintaining a peaceful condition of society for the pursuit of peaceful industry, but does not the suggestion that the state may exact compensation for preserving the peace for any particular person or class of persons imply that it may equally withdraw protection from that person or class until its own arbitrary terms are fulfilled? Is not this essentially a feudalistic conception that the state is, in its own discretion, furnishing protection in consideration of base subjection and servitude?

The more equitable and scientific view is that the very function of the state, the very reason and justification of its existence as a juridical person, is to furnish protection to all the peaceful inhabitants, regardless of their prosperity or poverty, and that this is a duty to be performed, not a commodity to be bartered out for terms imposed on the persons who are entitled to the performance of the duty. In short, that the pursuit of peaceful industry in a peaceful community and the enjoyment of the fruits thereof is a right and not a special privilege, and that the duty of protecting that right is the basis and justification for the existence of a public right of taxation over certain kinds of property having a public interest by their nature, and is not the justification for the imposition of a servitude upon the particular inhabitants, which servitude is veritably imposed when the private person is required by the external force of a superior power to suffer a penalty for the compensation of his own labors, either of muscle, hand or brain. Yet this is precisely what an income tax does in respect to the earnings of the private citizen, and in so doing requires him at the extraneous demand of the state to hold the proceeds of his own exertions, not primarily in his own right, but in the right of the state which imposes the servitude on him.

It makes no difference whether the charge of the state is large or small in proportion to the earnings for which the charge is levied. The servitude consists in the determination by an extraneous power, for its own benefit, how much of a man's earnings for his personal efforts he shall be permitted to retain for his own enjoyment, for it cannot be pretended that so much as is taken away from him or for which he must pay over a counter-penalty merely on account of its acquisition is enjoyed by him. The claim to interfere and take a part arbitrarily determined by the taker without a preëxisting right in the source of income itself is no less than a claim to take the whole whenever the taker in its own discretion may choose to do so. This is essentially and inevitably a proprietary claim over the earner in respect to his earnings.

The fundamental vice of a personal income tax is the servitude which it imposes on persons regardless of any just public interest of taxation over the source of the income. The taxing of a person for the income from a certain source, whether particularly or as a part of the person's general income, is the same as taxing the

person for his title to the source. If such source is of a nature like land and franchises within the jurisdiction, and justly involving a public interest of taxation, the attack on the person is a servitude in neglect of the true public interest; while if the source is one in which the taxing government has justly no public interest of taxation, then the attack on the person is an encroachment on his exclusive right, implies a proprietary claim over him to require him to hold the source and the income therefrom, not in his own right, to which he is justly entitled, but primarily in the right of his master and proprietor, the state, and thereby imposes a servitude on the person in utter defiance of right.

It cannot be too strongly emphasized that an income is not a special privilege in itself, but merely the manifestation of a source in respect to a particular person. It is, therefore, not justly a source of public revenue apart from the source of the income, but the income and the source thereof are one and the same when economically considered as a source of taxes. The connection between income and source is used by the British income tax acts as the basis of a system of "stoppage at source." Those acts contain elaborate provisions requiring persons and institutions having charge of the payment of incomes from investments to withhold the amount of the tax and hand it over to the public authorities, so that so much of the nominal income never comes to the theoretic recipient at all. The law even goes so far as to prohibit the making of contracts for a net income of an exact and irreducible amount without any deduction. The income tax law of Great Britain in one section declares that "all contracts, covenants and agreements made or entered into, or to be made or entered into, for payment of any interest, rent or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void." The logical basis of such a provision seems to be that after the owner of property or funds has agreed on the compensation to which he is to be entitled for the use thereof, he must hold that compensation primarily to the use of the government and take his chances as to the amount which may be left for himself, and that he has no right to an exact stipulated return for himself, even if he provides fully for the government tax out of some other element of the transaction, as by the agreement of the debtor to pay the tax.

It is at least extremely doubtful whether such a provision can

accomplish anything more than to import an element of doubt into the contract of loan and to throw the principal burden of that doubt on the borrower, by increasing the nominal amount of the interest charged by enough to offset the probable deduction for the tax. The experience of New York and other states with mortgage taxation seems to show that any effective provision for imposing a special tax for the existence of a debt falls principally on the borrower by an increase in the interest rates, and the same principle would naturally tend to operate with even a small tax for the income, as well as with a large tax for the capital, although the effect might not be so clearly visible; but the claim of a government that a man should lend his money as if there were no tax and then divert a portion of the compensation from himself is essentially a proprietary claim over the man in denying his right to the compensation for the use of his funds.

The system of stopping at source is at once a confession that a mere claim against the individual recipients is an ineffective basis of collection, and is also an admission that any just claim of the government to deal with the income from an enterprise should seek the enterprise itself and not the ultimate beneficiaries, that the claim of the government when justly founded is to be based on some public interest involved therein, and not on a proprietary claim over persons. The system of stopping at source is, therefore, in some of its practical aspects, analogous to a franchise tax, or in the case of rents, a land tax, although it does not necessarily follow that all stoppages, as, for instance, from interest on loans or mortgages, would be justified under either of those headings. The analogy consists in this, that the sums collected by stoppage, equally with sums taken by a franchise tax against an enterprise, are taken from the enterprise in the hands of its managers as a condition of doing business, and the apportionment of such sums to individual income accounts is merely a bookkeeping device which cannot, whether it is called one thing or the other, differently affect the position of the nominal beneficiary who in either case gets merely something that is left after the government has satisfied its charges against the enterprise.

The investment value of a security will naturally be substantially the same whether the sum collected from the enterprise is called a tax against the enterprise as a part of its running expenses,

reducing the amount available for distribution among its ultimate security holders, or is called an income tax taken out of a nominal apportionment of dividends and interest to the security holders, with this difference, that in the case of interest or nominally fixed returns, the fixing is only at a maximum and the creditor is not assured of a certain net income. The natural result would seem to be that the enterprise in selling its securities of indebtedness would realize a lower price for its paper than it would if it were allowed to guarantee an exact return to the investor to his own use, for it cannot be supposed that an investor will give the same price for a security when the nominal income is liable to be partially diverted from him, as he would give for the same security carrying a clean irreducible income, and thus the lowering of the price of the security by means of an income tax seems to fall on the enterprise as well as if it were openly a franchise tax.

Whether any particular instance of an income tax by stoppage at source can be identified in effect with a justifiable franchise tax against a certain enterprise, or any other kind of a tax against the enterprise by reason of some special privilege enjoyed or some public interest involved in the subject-matter must, of course, depend on the circumstances of each case. Perhaps, however, the analogy between a franchise tax and stoppage at source would make a federal franchise tax a reasonable substitute for a federal income tax which so many persons are eager to establish, as it might perhaps operate as an excise against privileges conferred by law rather than as a direct tax against persons, and it would accomplish in a better manner all for which the advocates of an income tax have any ground of complaint, in that it would reach those aggregations of privilege at headquarters rather than the private investor personally. Many of these great enterprises which excite so much suspicion at the present time are necessarily involved in the employment of some important federal privilege, and to that extent at least a federal tax for franchise or license would be obviously justified. Whether the federal government should or could go further and attack the merely state franchises under its general constitutional powers is a somewhat different question, but if it should not or could not attack those sources of income, that would be all the more reason for not imposing a servitude on the recipients of income from sources not properly within federal jurisdiction.

In other words, in the case of the federal government, as well as in the case of any government, so far as the source of the income is justly within the jurisdiction and involves justly a public interest of taxation, that source is the proper point at which to assert the tax, while the absence of such a just public interest of taxation over the source equally forbids any claim to the benefit of that source or to impose a servitude upon the recipient of the benefits and deny him the right to those benefits to his own use.

The imposition of a personal income tax is in itself the assertion of a proprietary claim over the person in respect to the disposition of his resources primarily not for himself, but for a master at that master's discretion, and is a penalty on him for the attempt to enjoy the benefits of his property, labor and skill, since it is imposed without regard to the question of the existence of a just public interest over some sources of income and the absence of any such public interest over other sources. It implies the claim to penalize to the full extent of his income equally as well as for an arbitrary fraction extraneously determined. It is thus a servitude over the person by seeking to divert the just incidents of his own life to the wilful determination of a master for that master's benefit, regardless of antecedent right. The method of administration, moreover, necessarily emphasizes this essential servitude of the system, for it requires a searching inquisitorial investigation into the affairs of the private person or an arbitrary decree against him. Such an inquisition or decree at the spontaneous demand of the investigating power, merely for its own benefit under a claim created by itself, and not for the protection of threatened antecedent rights, implies the denial of any right for a person to have any business which he can call his own for his own benefit, either in the use of his property or his labor and skill, and in the requirement that a man shall account for his own life to the arbitrary demand of the government, such an inquisition or decree is in itself the manifestation of servitude over the person by that government.

The words of George F. Edmunds, in the course of his argument on the constitutionality of the federal income tax (157 U. S. Reports, at page 485), are applicable in principle to any personal income tax, whether constitutional or not in any particular jurisdiction. Said he: "Here is a statute which declares that a particular officer of the government and his deputies . . . may

compel every citizen . . . to make a report to him answering a series of questions under authority of this act . . . which invade every item of his private transactions, and affect the interests of everybody with whom he has been in connection, in situations of trust of the most sacred confidence, . . . and compel him to expose everything to the satisfaction of this agent of the law, as he is called. And if he does not do it, when then? Then this so-called agent of the law is to make up his mind, from such inquiries as he chooses to make, how much this man's income really is."

Can such a situation denying the right to have any business which a man can call his own or enjoy any benefit of his property or efforts in his own right be described as anything less than serviture? Can a system which demands an accounting for every compensation for one's property or labors, not because that compensation is excessive or in violation of an antecedent right, but merely because it comes to a private person,—which imposes a penalty on the person for presuming to obtain that compensation,—can such a system logically rest on any other basis than a proprietary claim by the state or government over that person and the imposition of a servitude on him? Rather may we say that the establishment and maintenance of such a system is fundamental tyranny and unqualified iniquity, and is utterly inconsistent with the principles of freedom and justice.

Chapter VII

THE RESTORATION OF FEUDAL BONDAGE.

It is a strange phenomenon that peoples so tenacious of personal freedom as the English and the Americans should tolerate the various systems in vogue for taxing persons in respect to personal property owned or income received by the person with the necessity for inquisitorial investigation into private affairs, the denial of private right, and the consequent servitude imposed on persons. This phenomenon is perhaps to be attributed to a subconscious survival of the old feudalistic conceptions from which the society, the structure, and the politics of English and American civilization are historically derived. But not only do the English and American peoples tolerate these systems of servitude. On the contrary, there seems a strong popular desire in many quarters to make these systems more stringent and drastic, and even to evolve other methods of attacking the ownership of property, not on the basis of some just public quality in the property itself, but on account of some personal incident in the ownership, so that in effect some of the old feudal impositions under modern names are revived with the utmost eagerness by the very classes which were most cruelly oppressed in feudal times.

Twice within a half century has the government of the United States of America imposed stamp taxes on deeds and other instruments of transfer, and recently the State of New York has imposed such taxes on the assignment of stock certificates for the sale of stock in corporations. What are these charges in effect but the old feudal fines on alienation, or the denial of any right in the owner of property to transfer his title except by permission of a superior who for his own benefit restrains the transactions and exacts a compensation for his permission? Under the feudal tenure of land such fines on alienation had a logical basis of origin, since the title was originally granted to a particular person to be held of the lord by the service of the tenant, who was bound to respond for

those services till released by the lord. The tenant held a mere tenancy in the land and was not originally entitled to convey it except by surrendering it into the hands of the lord and obtaining his acceptance of the new tenant. As the lord had the original right to reject the new tenant, and the alienation was in the nature of a favor, the imposition of a charge for license to alienate was logically derived from the tenure and symbolized that tenure, even after the fine had acquired the character of a customary charge for which the lord must grant license as a matter of law.

The idea of an allodial title or the outright ownership of the private interest in property, whether or not that property from its nature involves a public interest or servitude of taxation over the property itself, implies no such interference with the owner on account of a merely personal incident of the ownership, but the existence of a perpetual private title with the right to transfer the same and the right to the whole equivalent without arbitrary restraint. Undoubtedly the organized state under its protective and tutelary dominion has the right to provide regular and reasonable machinery for the security of the transfer of titles, as by the recording of instruments, and a charge for that service rendered is not necessarily within the objection of a fine for alienation, but when the government at its own motion and for its own benefit interferes with the private title and imposes a charge, not for a public interest in the kind of property, or for service rendered, but merely for a personal incident or accident affecting some particular title or piece of property, the government is in effect asserting a species of feudal tenure and establishing a class of collateral incidents or casualties, such as afflicted the holders of property under the old feudal régime.

Such incidents or casualties rested logically on the feudal theory of holding of a superior or lord who retained an estate of superiority or lordship in support of the casualties, but they are entirely at variance with the idea of an allodial title or individual private ownership in one's own right, whether in lands or movables, for such title or ownership is in theory a perpetual interest in private hands, is entirely distinct from, though subject to, any public charge, interest, or servitude, over the particular kind of property itself, and implies the right to transfer as large an interest as the owner has, and to enjoy the full equivalent from the transfer, as a

part of the complete enjoyment of the title. If the property is of such nature, as land, that it involves a public interest of taxation prior to the private interest of title, the title is of course subject to the public interest in the hands of one owner as well as in the hands of another, and the transfer is, therefore, immaterial to the security of the public interest, and is solely a matter of private right under the private title. An interference with this right of transfer, not for the general security of transfer, but for the benefit of the government is, therefore, in effect a derogation from the right of allodial titles or private ownership, implies the assertion of an estate of superiority and is in effect the establishment of a species of feudal tenure imposing a burden on the owner in respect of some personal incident of his ownership. This is indirectly the imposition of a servitude upon him by encroaching on a right to which he is entitled.

Among the incidents of the feudal tenure in England were *reliefs* and *primer seizin*. *Relief* was a payment exacted by the lord of the fee for admitting the heir of the tenant into the inheritance, and was so called because the heir was considered as relieving or taking up the estate. *Primer seizin* was a similar charge, being a whole year's profits exacted from the heir to an estate held of the king immediately in chief. Both of these incidents resulted logically from the original feudal theory of a tenancy which at the death of the tenant reverted to the lord of the fee, to be regranted as the lord chose. As the new grant was originally in the nature of a favor to be given or withheld at pleasure, the tenancy was in effect merely for life, and the heir could claim only by the favor of the lord on complying with his terms. When the tenure became hereditary the feudal theory still maintained the necessity of recognition by the lord of the fee, and allowed the exaction of a charge for that recognition. The lord, however, was required to admit the heir if he complied with the legal terms. As a result, the heir did not have in the original feudal conception a direct claim to the property, but rather a right to repurchase it from the lord of the fee on complying with the rules of the tenure. Thus these incidents or casualties of tenure were the logical outgrowth of the feudal theory of carving the estate of the tenant out of the larger estate of the lord and leaving in the lord a reversionary estate of superiority over the land and the tenant.

On the other hand, an allodial title, or the complete private ownership of all the private title to which a certain piece of property may be by its nature adaptable, whether or not that title may be subject to some public interest involved, implies no tenure of an estate held of a superior, and equally implies no incidents and casualties arising from the personal conditions of the holder of such title, since such incidents and casualties fundamentally depend upon the existence of an estate of superiority in the superior of whom a feudal title is held. The establishment of casualties by the government in respect to a title hitherto allodial or outright would be, therefore, in effect the establishment of an estate of superiority in such property in derogation of the prior existing titles, and the establishment of new casualties over a title already feudal would be in effect the enlargement of the estate of superiority in such property and in like manner a derogation from the prior existing estate of the tenant. In thus reducing an existing title from a higher to a lower, and privately less beneficial rank, the government would be imposing a servitude on the owner of the property in requiring him to render service or compensation for that to which he is already entitled by prior right.

This is exactly the situation which is created by the various laws for the imposition of inheritance taxes, or public charges for the succession to property at the death of some person in interest, unless there is some public interest involved in such succession in a way to distinguish the charge from its resemblance to the old feudal casualties. This resemblance appears in the provisions refusing to recognize the title of the successor as legally valid to the entire interest nominally involved and charging that title with a lien for the public demand, or ordering the executor, administrator, trustee, or other fiduciary person in possession of the property to withhold it from the beneficiary or to divert from it when it is a pecuniary fund the amount of the public charge for the succession, so that the beneficiary gets merely the remnant of the fund to his own use. These provisions are further supplemented as a rule by imposing a personal liability on some person entitled to deal with the property for dealing with it in disregard of the public claim, so that the title to the property and the dealing with it are treated, not as matters of private right, but as if a matter of tenure under a superior by virtue of the license and permission of such superior, or as if

subject to some prior public right essentially involved in the fact of the succession at death. It, therefore, becomes important to examine the extent of public and private rights which may be justly comprised in such succession. This may be considered under the three points of view, the right to receive, the right to bestow, and the power to make a will.

It is commonly asserted by the courts that the succession to property, either by intestacy, will, or deed to take effect at death, is not a matter of natural right, but a special privilege conferred by law. If it is merely a special privilege, it seems to follow that the organized state may grant or withhold the privilege in whole or in part in its own sole discretion or may justly confer it on any person or class of persons regardless of relationship to the deceased or his wishes as to the disposition of the property. Such a doctrine seems to rest on viewing the human being as a totally dissociated juridical phenomenon, so that at his death no natural person can have any just interest in his affairs, and the organized state with which he happened to be associated by citizenship, residence or the situation of his property becomes entitled to his estate as property belonging to no private owner or just claimant until the state confers it on some one as a favor. Such a view disregards the most vital elements of human life, for man is not a mere stone image inspired by the state, but is endowed with an individuality and with various human relationships much more intimate than his mere juridical recognition by the state. These human relationships reach their most intimate point in the human family, which, in its theoretical perfection, is the opportunity and field for the most helpful mutual relations, and what can be more just and natural than that at the decease of a member of a family the family itself has the right to the property of which he has made no disposition.

This family right seems to be recognized to a degree in all civilized states. Is it any accident that, aside from creditors and public claims, the immediate relatives in various ways are generally treated as entitled to some interest in the estate of a deceased person? Is this a mere favor or is it a recognition of some fundamental right? It is undoubtedly true that no particular person can claim in his own right any particular portion of the property of a deceased person unless he can show himself within the terms of some positive law, but it does not follow that because the state

might conceivably have pointed out some other disposition, the state might justly refuse to make any private disposition of the property whatever, and appropriate it to itself, yet that is exactly what the state does as to so much of any nominal share of an estate or fund as the government diverts from the nominal beneficiary.

A human being comes into this world helpless and dependent. In the normal and general case he finds himself in the midst of a group of persons constituting a family and having more or less definite interests in common as a family. This group is for some interests narrower and for other general interests broader, but in general the bond of union is the relationship by blood. To this group the human being naturally looks for much of the development of his life, and each member of the group has a more or less definite feeling that in an emergency he may look to the others for somewhat more of assistance than to a mere outsider. From this claim of mutual regard and benevolence the group in turn may look to each member for some part in the mutual well being, and if one of the group leaves property of which he has made no disposition, though the extent of the right of disposition is a further question, the group as a whole and all members of it logically have a right to require that such property shall be in some way applied within the group of relatives of the deceased, as those who would have been justified in receiving aid in the lifetime of the deceased and might have felt bound to assist him in need. In other words, the right of the members of a family to receive aid from one of their number by his benevolence during life should not be considered as lessened, but as increased, by the fact that he has left property for which he has made no disposition, and the family right may, therefore, be said to consist of this, that after all just rights and powers of the individual owner of property have been exhausted, there is a secondary right in favor of the family to require that in some way the property shall be used for the benefit of some one or more among those who in his life had a more intimate claim to his good will and a more intimate interest in his good standing than the generality of the world.

Now, where the line shall be drawn between the primary individual right of the living owner and the secondary successional right of the family, is an entirely different question, and it may perhaps not be the same at all times and places, but it seems logically

necessary to say that where one leaves off the other begins, and that the succession to intestate property within the family is not primarily by virtue of a lapse of the private title and its regrant by the state, but that the family right of succession is itself a part of the private right in a perpetual private title not otherwise limited by the terms of its creation and extends to the whole of that title. At this point the action of the state through positive law becomes necessary to apportion the various relationships of family life into a series of priorities in the family succession to the property of the deceased, but this intervention of the state does not justly lessen the sum total of the family succession. It merely establishes general rules for the priority of certain persons or classes of persons within the field of the family relationship, and these take justly, not by favor, but by right of the family. In other words, the action of the state is semi-judicial in the nature of apportioning a sum total to or among one or more possible claimants, and is justified under the general protective and tutelary public powers.

The family right is residuary as a part of the private right to the private title and is subsidiary to the individual right of the living owner. The function of the state is to adjust the balance between these two component parts of the private right and to apportion the family right among such successive classes of the family group as under general conditions may seem to be most directly interested. Accordingly, the different rules of succession in different states signify not the arbitrary distribution of special favors which might equally justly be given to any person or group of persons, but simply the different emphasis which seems to exist in different communities between the members of a group within which in some manner the persons to be preferred must justly be found. Likewise the exclusion of one member or class of members of the group must justly rest upon the selection of some other class as under general conditions better representative of the family right, rather than upon the intrusion of an outside power at its own option to exclude each and every class of the family from some arbitrarily determined portion of the succession; for the claim of the state to exclude for its own benefit all the family from some portion decreed by the state itself logically means the claim of the state to make that portion indefinitely large and ultimately to seize the whole, to the total exclusion of the family, and the complete denial of the family right.

Succession by intestacy as a part of the private right to a perpetual private title, therefore, applies to the whole of that title, and not merely to the remnant which the state may choose to leave untouched by its charges, and is a right belonging primarily to the group of persons more or less closely related, which may be called for convenience the family. The person taking under such succession claims justly by right of his family, although as between himself and the other members he must bring himself within some positive law, but such succession is not thereby a mere privilege created as between the state and the taker. There is a third person present, the family, whose rights the state is in duty bound to protect and recognize in selecting the persons to take. In apportioning the family right among its members the state may justly select certain classes of relatives for priority, as is frequently done in favor of the widow and minor children, and according to the same principle, perhaps, it might conceivably widen the circle of taking relatives when the prior classes have received certain specified sums. Such an enlargement of the field of inheritance might in some cases be consistent with the general family right, although its bearing in other directions might raise a variety of questions, for what is withdrawn thereby from one member is appointed to another member also entitled to represent the family right. But when the state, instead of appointing some one or more members of the family group to the possession of the family succession, arbitrarily for its own benefit diverts a part of the estate from all the members of the family or refuses to allow a certain member to participate, except upon a diversion of a part of his nominal share, not for the benefit of other members of the family, but for the state's own benefit, the state in so doing is denying the family right, invading the private right to the private title, and imposing a servitude on the person whose nominal share is encumbered, withheld, or depleted by the arbitrary exaction.

The succession by intestacy rests upon the right to participate in the natural relationships of life and constitutes a part of the private right to a perpetual private title in property, whether, as in the case of land, that title is concurrently subject to a public interest of periodic taxation over the subject-matter itself, or is a title to a kind of property over which, as in the case of the products of human labor, we may contend that the private right should be

exclusive of any public claim of taxation for the mere ownership or enjoyment thereof. The theory of the concurrent existence of a perpetual private title to, and a public servitude of taxation over, a piece of landed property, implies that the public right of taxation is limited to the public servitude according to the nature of the property itself, and not according to the personal accidents of ownership in the hands of some particular owner or class of owners, for the right of the public servitude over a particular piece of property should justly be the same regardless of the temporary ownership. So, too, the assertion of a just private right to any species of property exclusive of any just public claim of taxation for the ownership or enjoyment thereof equally excludes any claim to a just public interest on account of the personal accidents of ownership, for then the private right of enjoyment to the same property or fund would be different, according to these mere accidents. The theory of a perpetual private title, whether with or without a just public claim to periodic taxation over the subject-matter, implies, therefore, a right to receive any legally existing property to one's own use to as large an extent as the prior owner is justly entitled to transfer it, and we come to consider the right to bestow and the power to make a will.

It has already been urged in these pages that the existence of a perpetual private title justly includes the right to transfer it as a part of the enjoyment thereof, for the use and benefit of property would be extremely scanty if the owner were limited to such use as he might make with the particular thing, and if he could not exchange his title for something which, to him, for the time being, seems more acceptable and beneficial. As his right to the title itself is a right to the whole title, subject only to such encumbrances as affect the title itself in any owner's hands, so his right to the equivalent or compensation is entire and not merely a right to so much of the compensation as may remain after a power external to the owner has diverted by its arbitrary choice for its own spontaneous benefit a portion of that compensation; for the claim to deprive the owner of an arbitrarily determined portion implies a claim to make that portion indefinitely large and to absorb the whole at discretion. Thus the right of transfer is an essential part of a complete title, and is not a mere additional privilege for which a special charge may justly be exacted.

As the right of the owner to the whole compensation or equivalent for his title is a part of the right to the title and the enjoyment thereof, so the owner is correspondingly entitled, so far as his rights of property are concerned, to accept such equivalent as seems good to him under any particular circumstances, even though that equivalent may be obviously inadequate to the fair value, and he may, therefore, reduce that compensation or equivalent to the vanishing point and transfer his title as a gift. Thus the size or existence of an equivalent is immaterial to raise a public interest in the transfer of a purely private right and the right to give away one's property is also an essential part of a perfect private title, as a right included in the right to sell, dispose, and transfer,—but always on the supposition that the owner is acting as a reasonable man, not encroaching on the rights of others. Thus a man who is insane may justly, for his own benefit, be restrained from squandering his property by gifts as well as by reckless expenditure, and likewise a man who owes just debts may be said to be under an obligation to his creditors not to impoverish himself by malicious generosity. Within these limits there is admittedly a justification for intervention by the state under its tutelary and protective powers to restrain or revoke the transfer or the gift, either for the benefit of the incompetent donor, or for the benefit of the creditors whose antecedent rights have been threatened.

When, however, an organized state or nation by its governmental power assumes of its own spontaneous arbitrary choice to refuse validity to a gift, merely because it is a gift, except upon the condition of receiving an arbitrary charge from a party to that gift or diverting a portion of the intended gift from the intended beneficiary into the public treasury, it is acting, not by a restraint for the benefit of one who is unreasonably threatening his own interests and who should be guarded from himself, nor for the benefit of one whose antecedent rights are threatened and should be protected, but is imposing a restraint arbitrarily for its own benefit where no public interest exists. In thus encumbering or diverting a gift the government is encroaching on the rights of the recipient in preventing him from receiving so good a title or so large a title as the donor parts with, and is also encroaching on the rights of the donor in depriving him of one kind of enjoyment of a certain portion of his property by diverting it from the desired beneficiary of the gift,

or by requiring the donor to pay an additional sum over and above the amount which he bestows to the real benefit of the beneficiary. In thus restraining the donor and the beneficiary, not for the benefit of themselves or of either or of some person whose rights are threatened, but for the arbitrary spontaneous benefit of the government at its own choice, the government is depriving both parties of the enjoyment of a transaction to which they are both entitled as a right, not as a privilege, in requiring them to transact the business, not in their own right, but primarily in the right of a master, and is thereby asserting a proprietary claim upon them and exercising a servitude over them.

Now, the right to give one's property or to transfer voluntarily the whole of a certain piece or article or fund includes the right to give less than the whole title which the owner has, if less than the whole can at any time be transferred, and thus to divide it into successive interests for different beneficiaries during different periods. This at once raises the question whether the division of a title into successive estates or interests implies any public interest arising thereby. It may be at once objected that, although the right to give away the whole title is a part of the right to the enjoyment of the property, yet the kinds of partial estates or temporary successive interests into which the title may be divided rest entirely within the provisions of the law for recognition or rejection. It is undoubtedly true that the kinds of estates or interests which shall be valid in law are dependent on the law-making power in order to be effective, but this determination must justly be, by general rules of law, adapted to make certain and secure the dealings with the property, and, moreover, it is to be considered as providing for the subdivision of the private title by those who are entitled to deal with it, and not for the interjection of an extraneous interest to divert a portion of the private right. As the whole must consist of all its parts, so the whole private title, when subdivided into successive interests, should be no less than when it is held as a unit, and the sum total of the successive private interests should justly make up as large a private title as if it were not subdivided. Yet if the government declares that at the passing from one estate to another a special charge shall be interposed for the government itself, it is thereby rendering the estate of the new taker less comprehensive than the estate of the previous holder, for it becomes

subject to an extraneous charge which lessens the value or depletes the fund, so that as the process continues the private title in the subject-matter becomes constantly less than before each successive step, and the sum total of the successive private interests becomes less than the original whole title from which they were carved out.

Hence the right to give away one's property includes the right to give away a qualified interest therein, and the just relation of the state to such a transaction is merely to provide reasonable rules as to the legal instruments necessary to accomplish the purpose. So also the right to give away implies the right to retain for one's self a qualified interest in the property without lessening that total private right; for such qualified interest retained is in effect the same as a reconveyance from the donee in the way of compensation for the transfer. The legal machinery necessary to accomplish the purpose effectively must, of course, depend on the law, but the right to seek that purpose and to look to the law for some reasonable means, results from the right to dispose of one's property and enjoy the compensation. As it is justly within the right of the owner, as between himself and the public, to accept less than the full value for his property in the absence of fraud against the rights of others, so it is also within his right to accept for his property the agreement of the new owner to spread the compensation over a period of time, either definitely or indefinitely determined.

Accordingly, if an owner transfers his property to a new owner, and in return the new owner agrees that the old owner shall have a stated periodic payment for the rest of his life, or shall have the use of the property for his life, then that periodic payment or use is merely in the nature of compensation for the transfer, and the transaction is entirely within the rights of transfer incident to a perpetual title in private right. Now this is in effect the situation created when a person transfers his property to another by any kind of instrument to take effect at the death of the owner, although the law may look only at the form of the instrument and describe it in variously different terms. Yet in substance the effect is the same regardless of the legal formalities, and when the government intervenes and refuses to recognize the transaction merely because it depends on an insufficient compensation, or because it confers a gratuitous benefit on the taker, and requires that the estate taken by the beneficiary shall be charged or depleted by a government

exaction, it lessens the private title in preventing the taker from taking so large a share as the disposer disposes of, and in diverting a portion of the intended benefit it violates the right of the disposer to dispose of his private title for so much compensation, much or little, as satisfies him. In thus defeating and depleting the private title in the absence of any public interest or threatened antecedent rights of others, the government, by an act for the spontaneous benefit of the government itself, asserts a proprietary claim to dispose of the rights of both parties and exerts a servitude over them.

The right to bestow by a transfer in life, either outright or by a qualified interest with a reserved estate for the donor in the nature of compensation for the disposition of his title, is a part of the general right to transfer essential to a perpetual title in private right, and is entirely apart from any public interest which may exist over the property by reason of the particular nature thereof, for any such public interest whenever it exists is equally valid against the property in the hands of any owner, so that the mere fact of transfer raises in itself no special public interest thereby. The justification of an interference with the transfer must, therefore, in any case rest upon protecting some antecedent right. Thus there are many rules of law for the methods of making transfers of property, or affecting the validity thereof as between the parties thereto. The laws of France and some other countries, for instance, contain elaborate provisions as to the legality of gifts as affecting the position of the family of the donor. The justice or wisdom of any such provisions is immaterial to the present discussion, but such laws are totally distinct in nature from a governmental diversion of private rights at the arbitrary choice of the government for its own benefit, for they show rather the recognition of a secondary family right along with the primary individual right, the individual right and the family right, together existing within the private right in a perpetual private title. The existence of both these phases of the private right explains the existence of laws apportioning or delimiting these two parts of the private right among conflicting claimants, since such laws come under the tutelary or protective powers of government. Such laws, therefore, do not support any claim to defeat a transfer in whole or in part merely for the government itself.

Whether the right to bestow should or should not be limited

as between the individual right and the family right, there is an additional phase of the matter when the bestowal is within the family, and we then have a combination of the two phases of the private right. Man not only finds himself in this world in the presence of a family to which he may reasonably look for a special degree of friendship and aid, but he also has the right to respond to the corresponding claims of his relatives. He not only has a duty to the immediate family dependent on him, but he has also the right to benefit that family and the members thereof. Thus, when a person is exercising his right to bestow by conferring gifts upon the members of his family, in the absence of any fraud against his just creditors, such a person is not only acting under his individual right, but is in a certain degree recognizing the family right even if the particular member benefited is not one of those who would be immediately selected by the law of intestacy if the donor were dead, for the law of intestacy must act by general rules for the attainment of general ends, and cannot take account of the special circumstances which, in particular cases, may furnish a reason for a special gift to some particular member of the family. But, on the other hand, the right to bestow upon one's family includes also the right to expect that the property which the owner does not wish to dispose of shall go to those to whom he may be said to have a particular right to give it, namely, those who have the claims of kindred, or who may be dependent on him. Accordingly, if the relatives pointed out as beneficiaries by the law of intestacy are perfectly satisfactory as beneficiaries to the owner, he has a right to bestow his property upon them by inaction, with the full confidence that the whole of the property beyond expenses shall go to such persons and not merely the remnant which may be left after answering some extraneous exaction decreed by the government for its own benefit. Thus the diversion of a part of an intestate estate away from the family by the spontaneous action of the government for its own benefit, is not only an infringement of the family right to receive, but indirectly also of the individual right to bestow.

Now, if the transfer of and succession to property by intestacy, or by gift, whether in the life of the giver or to take effect at death, are parts of the general private right in a perpetual private title, according to the foregoing pages, what is the nature of the power to make a will? It is commonly said that the making of a will is

purely a matter created by law and is, therefore, merely a special privilege which may be granted or withheld at the pleasure of the law-making power. It is, in fact, actually withheld from certain classes of persons by the laws of most countries, and is frequently limited in its operation as against certain relatives of the deceased. Thus the widow of the deceased generally has a certain portion beyond the reach of the will of her husband, and in France and some other countries there are strict provisions of law against excluding the children of the testator from certain portions of the estate. From such provisions it is argued that the making of a will is purely an artificial privilege of the law, to be qualified in the full discretion of the state. It is undoubtedly true that a will must, in order to be effective, comply with the requirements of the law, but such requirements are justly founded on the need of security and certainty for those who deal with the property. It does not follow that because the method of making a will, and the scope and the effect of the will must depend on the law of the organized state, that the state is conferring a gratuitous favor which it may withhold or limit for its own benefit. The result of the non-existence of a power to make a will in any particular case, or the result of the failure to comply with the rules of the law for making a will must justly result simply in leaving the property to go as property of which the owner has not disposed and the rights existing by intestacy intervene.

Now, if the state were justly the natural successor to intestate property, and the usual intestate succession within the family were merely a favor granted by the law, then equally the power to make a will would be merely a favor to be conferred in whole or in part by the state at discretion. But if there is justly a family right, as a secondary group right, to demand that the property of which no disposition has been made by the owner shall go in some way among the members of the family, then the power to make a will is not a mere favor at the expense of the state, but is rather an apportionment and delimitation between the primary individual right and the secondary family right co-existing within the limits of the private right of a perpetual title. So much power as is conferred by the power to make a will is not in derogation of any rightful public interest, but is the postponement of the family claims to the individual claims and the creation of a piece of legal machinery for

the exercise of the right to bestow, so that without parting with his property during life a man may enjoy the use of it during his lifetime and indicate its disposition after his death.

Now this is in effect of the same practical result as when a man transfers his property for a compensation consisting of some use or benefit of the property during his life. As such a transaction is within the just limits of the right to transfer any perpetual title, whether or not encumbered by some public interest over the property itself, so the power to make a will is simply a piece of legal machinery for accomplishing in one manner a result which the owner has a just right to accomplish by indirection, and for the accomplishment of which he has a right to demand of the state that some machinery—not any particular machinery—but some machinery or other, shall be provided or recognized. It is admitted that one method as well as another may justly be qualified for the protection of the just claim of those whose rights may be threatened, or for the recognition or delimitation of the family rights, but such qualifications come under the protective right of the state, while the power to make a will, so far as it is conferred at any time or place, is not a mere privilege from the state, but is a recognition of the individual right to bestow as between the individual right and the secondary family right.

As the power to make a will is accordingly to be considered as a recognition of the individual right to bestow, so as between the state and the property owner the power must be exclusive so far as it is allowed at all. That is to say, it may be qualified or withheld in the delimitation of the family right or the protection of the threatened antecedent right of just creditors or others, but it may not be justly conferred merely for its enforced use for the benefit of the state itself. As the right to transfer and bestow either by active gift or by passive intestacy is a right to pass as large a title as the owner has in perpetual private right, so the power to make a will should justly be considered when it exists as the power to pass just as large a title beneficially as may not be required to satisfy the interests reserved for the family or the just claims of creditors or others with antecedent rights. The power to make a will, although only a piece of legal machinery, is yet a recognition of the individual right to bestow, as qualified by the family right or the antecedent rights of others, and so far as it is withheld, the

property excluded by the law from the power must, therefore, justly enure to the benefit of the family right or the antecedent rights of others having just claims upon the estate, and not for the benefit of the state at its own spontaneous choice.

On the other hand, the intended beneficiary under a will, if he is recognized as a person competent to take the intended benefit, should be recognized as competent and entitled to the whole of the benefit which the testator intends to bestow, or in so far as the intended beneficiary is treated as incompetent to receive, the lapse should justly enure to the benefit of some other persons interested in the estate, either under the will or by the family right, and incompetence should not be arbitrarily decreed by the state for its own spontaneous benefit, for the general right to acquire property includes the right to acquire it by any means by which the disposer has power to bestow, and to acquire as large a title and interest as the disposer has the right and the desire to bestow.

If now the government intervenes in the settlement of an estate by will, and, refusing to recognize the validity of the disposition as sufficient to pass as large a beneficial interest as the testator intended, requires the nominal gift or fund to be charged or depleted by an exaction arbitrarily and extraneously determined by and for the government itself for its own benefit, then the government ignores the family right in arbitrarily withholding the power to make a will, not for the benefit of the family or the protection of antecedent rights, but for the benefit of the government itself. It also thereby violates the right of the testator to bestow, in that it diverts a portion of his estate from the intended beneficiary, or requires the testator to bestow an additional benefit on an external power in order to bestow what he desires upon the intended beneficiary; and, moreover, it violates the right of the beneficiary to receive as large and as beneficial a title as the testator has the right to bestow, in that it encumbers or depletes the nominal gift to the beneficiary, not on account of his incompetency to take, enuring to the benefit of the others interested in the estate, but on account of an incompetency created by the government at its own choice and for its own benefit to prevent the intended beneficiary from taking the whole benefit of the intended gift. In thus encumbering or depleting the nominal gift, and requiring that the beneficiary shall take the nominal estate, not primarily in his own right, but in the

right of an external power at that power's arbitrary choice, the government is asserting a servitude over the testator in his lifetime in the enjoyment of his right to dispose, and is exercising a servitude over the beneficiary in the deprivation of that to which he is justly entitled as a matter of private right.

The right of transfer and succession, whether by intestacy, gift, or will, results naturally or logically from the existence of a perpetual private title over any species of property, for such a title implies that it may belong in full to some private person or persons at any particular time, and as the title itself in any hands must be subject to any just public rights which may exist over it by reason of the nature of the property itself, as, for instance, the servitude of periodic taxation in land, so also the fact that the title belongs to one person rather than another is immaterial to any public right, and the transfer or passage of the title, therefore, raises no public interest to encumber, deplete, or defeat, the transfer or succession, either in whole or in part, for the mere spontaneous benefit of the government itself. Nor does the fact that a particular transfer or succession takes place at or by reason of a death raise any additional public interest, for, as death is a natural incident of private life, so the idea of perpetual private title involves the idea that the devolution of the property at death must depend on some principle of private right. Otherwise the title would not be perpetually private, but would be reduced to a mere life estate, with a partial power to dispose, and the organized state would be the sole heir and successor.

Hence, when the government seizes on the fact of death as an occasion for diverting a portion of a private estate, it is in effect making itself the exclusive heir of that portion in defiance of private right. It is admitted that the method or manner of making one kind of transfer rather than another must depend on the provisions of the law, but this is consistent with the idea of private right, for it is designed or should be designed for the protection of the rights of those dealing with the property. In other words, it is merely a form or machinery which the state may justly vary for varying circumstances, but it does not follow that for a particular class of cases it may justly, for its own voluntary benefit, deny it altogether as to the whole or any part of the subject-matter. The American courts, in sustaining the constitutionality of inheritance taxes, have generally taken the position that, in the eye of the law, the devolu-

tion of property at or by reason of death, is to be regarded merely as a special privilege resulting from the forms which the law sanctions rather than from any inherent private right. The Supreme Court of Wisconsin, however, in the recent case of Nunnemacher *v.* The State, while sustaining the constitutionality of the inheritance tax of Wisconsin, recognizes a fundamental private right involved. Mr. Justice Winslow, for the majority of the court, gave the opinion, and therein discussed the question of natural rights in the succession to property at death.

In this Wisconsin case the constitutionality of an inheritance tax was attacked on several grounds. The first and only one necessary to be here considered was "that the right to take property by inheritance or by will is a natural right protected by the constitution, which cannot be wholly taken away or substantially impaired by the legislature." On this point the majority of the court, by Judge Winslow, said: "With the first of these propositions we agree. We are fully aware that the contrary proposition has been stated by the great majority of the courts of this country, including the Supreme Court of the United States. The unanimity with which it is stated is perhaps only equaled by the paucity of reasoning by which it is supported. In its simplest form it is thus stated: The right to take property by devise or descent is the creature of the law, and not a natural right." . . . "The fallacy of the idea that the government creates or withholds property rights at will is very apparent." . . . "That there are inherent rights existing in the people prior to the making of any of our constitutions is a fact recognized and declared by the Declaration of Independence, and by substantially every state constitution." The opinion discusses the constitutional guaranty of "life, liberty and the pursuit of happiness," and says that the term "pursuit of happiness" is a very comprehensive expression which covers a very broad field.

"Unquestionably this expression covers the idea of the acquisition of private property; not that the possession of property is the supreme good, but that there is planted in the breast of every person the desire to possess something useful or something pleasing which will serve to render life enjoyable, which shall be his very own, and which he may dispose of as he chooses, or leave to his children or his dependents at his decease." The opinion quotes with approval the words of Judge Brown, in the case of United

States *v.* Perkins (163 U. S. Reports, page 625): "The general consent of the most enlightened nations has from the earliest historical period recognized a natural right in children to inherit the property of their parents."

Continuing, the Wisconsin court says: "So conclusive seems the argument that these rights are a part of the inherent rights which governments, under our conception, are established to conserve, that we feel entirely justified in rejecting the dictum so frequently asserted by such a vast array of courts that these rights are purely statutory and may be wholly taken away by the legislature. It is true that these rights are subject to reasonable regulation by the legislature, lines of descent may be prescribed, the persons who can take as heirs or devisees may be limited, collateral relatives may doubtless be included or cut off, the manner of the execution of wills may be prescribed, and there may be much room for legislative action in determining how much property shall be exempted entirely from the power to will so that dependents may not be entirely cut off. These are all matters within the field of regulation. The fact that these powers exist and have been universally exercised affords no ground for claiming that the legislature may abolish both inheritances and wills, turn every fee-simple title into a mere estate for life, and thus, in effect, confiscate the property of the people once every generation." Accordingly, the court, in sustaining the constitutionality of the law, placed it upon the ground of reasonable regulation and said that "the general principle of inheritance taxation may be justified under the power of reasonable regulation and taxation of transfers of property."

It is not intended herein to criticise the Wisconsin court for its interpretation of its own constitution, nor to disagree with its decision as a mere question of constitutional law, but it is respectfully urged that on the score of justification in its broadest scope, the right of regulation of transfers and devolutions of property, applies to protecting and guarding the interests and rights of the persons dealing with the property, and not to the destruction of such interests and the denial of such rights for an incident not involving a public interest, by the imposition of an extraneous charge diverting a portion of the benefit of the property to the government at the government's own choice; for if the private right to the private title is entire, it is a right to the whole title beneficially, and

not merely a right to the remnant left after the arbitrary choice of the government to divert, while the assertion of a right of the government to divert and defeat a portion of the succession at the government's own choice, seems logically to involve the right to make that portion indefinitely large and thus to defeat the whole private title as well as a portion.

Inheritance taxes are frequently defended on the ground of being a charge for services rendered by the government in furnishing courts for the probate and administration of estates in analogy perhaps to a charge on a toll road for the use thereof. If this can be regarded as a valid justification in the case of some inheritance taxes, it is at least open to several qualifications, namely, that, although the government might exact a charge for the use of the courts which it supplies, such charge should be limited to the cases in which it is necessary to use the courts, and the government should not seek to drive into court for its own benefit property which can be settled out of court. Accordingly, a settlement made in the lifetime of the owner by a gift in trust to take effect at death should not be attacked by the law, for that would be analogous to driving a person through a tollgate merely for the purpose of collecting toll. Yet it is the general practice of inheritance tax laws to attack settlements under deeds made to take effect at death, as well as settlements by intestacy or will, and it is obvious that to limit the field of the tax to intestacies and wills would greatly reduce the revenue from the law.

Again, if such taxes are to be considered merely as charges for the use of the courts, they should be treated as general expenses of the estate, and in the case of wills should not be charged to the legatees distributively, to the reduction of the legacies intended by the testator. But, aside from these considerations is the more fundamental objection that the settlement of estates is not a mere favor or service which the state may perform or decline at pleasure. It is a part of the administration of justice, and by exacting a commission for performing its duty the government is violating the principle that justice should be sold to none and denied to none. Moreover, if the imposition of a probate tax or estate duty as a charge for the use of the courts can be considered as justified in the state which furnishes the courts, it is difficult to see how such a principle can justify a federal tax under a federal system in which

the federal government has no probate jurisdiction within the separate states or the power to change the laws of wills and descents.

If now, as herein contended, the spontaneous interference of the government, either local or national, to defeat for its own benefit the transfer or devolution of property for an incident which does not in itself raise a public interest, is a violation of the private right in the property, and if the rights of disposition and succession at or on account of death are only parts or manifestations of the general rights of transfer involved in the idea of a perpetual title in private right, then the imposition of public charges for the devolution of property at death is in effect the reduction of the private title to a species of feudal tenure, with casualties exacted for the personal condition of the title rather than charges for some public interest involved. In thus subjecting the owners to hold their title primarily in the right of a superior rather than in their own right for the occurrences of their own lives, the government imposes a servitude on them, and these inheritance taxes become analogous to the *relief* and *primer seizin* of feudal times.

These feudal casualties were the logical outgrowth of the original feudal relation of mutuality between lord and tenant for a personal holding of particular land, but, although the mutuality faded and the tenant's estate became hardened into a permanent property right, yet these casualties remained as servitudes upon the people. Blackstone, in Book 2, Chapter 5, says of *reliefs* that "they were looked upon very justly as one of the greatest grievances of the tenure, especially when at the first they were merely arbitrary and at the will of the lord, so that if he pleased to demand an exorbitant relief it was in effect to disinherit the heir." Nor is the modern inheritance tax alleviated in comparison with the feudal casualties in the fact that it is payable to the government rather than to an intermediate power, for the injustice involved is such by reason of the taking rather than by reason of the destination of the payment, and, in fact, the feudal casualties which were most oppressive were those payable to the king by his own tenants in chief.

"The oppression of the feudal conditions of *relief, wardship,* and *marriage* was enormously severe for many ages after the Norman Conquest, and even down to the reign of the Stuarts. Upon the death of the tenant *in capite,* his land was seized by the Crown,

and an *inquisitio post mortem* taken before the escheator, stating the description and value of the estate, and the name and age of the heir. The adult heir appeared in court and did homage to the king, and paid his relief and recovered the estate. If the heir was a minor, the land remained in wardship until he was of age, and sued out his writ *de aetate probanda,* and under that process he procured his release from wardship." (Kent's Commentaries, Part 6, Lect. 53.) This procedure has a striking resemblance to the settlement of an estate or a trust under a modern inheritance tax.

In some respects, moreover, the modern inheritance taxes are more grievous than the feudal *reliefs,* for in a federal system such taxes are often demanded both by the local and the central governments, and in case the assets are scattered within the power of several jurisdictions there are frequently several local charges exacted. Whereas the feudal rule in England was that *relief* was payable only once to one lord for one inheritance. Thus Bracton (Book 2, Chapter 36, Section 4), in considering *relief,* says: "And it is to be known, that it is not to be paid except to chief lords and the next feoffors, and if there be several chief lords gradually ascending, each heir shall pay a relief to his feoffor and not to the others; or to the lord the king himself, if by chance he hold of him in chief by military service." And in the next section he says: "Likewise how often, and it is to be known, that it is only once as long as the heir lasts who has once relieved." (Et sciendum, quod non nisi dominis capitalibus et propinquioribus feoffatoribus, et si plures fuerint capitales domini gradatim ascendendo, quilibet haeres relevium dabit suo feofattori et non aliis, vel ipsi domino regi, si forte de eo tenuerit in capite per servitium militare. Item quotiens, et sciendum, quod non nisi semel tantum, scilicet quamdiu haeres duraverit qui semel relavit.) Compare with this the situation under overlapping claims of several states and the nation as lords of inheritances, and we may see how close we are to the conditions of the feudalism which Chancellor Kent condemned as inconsistent with freedom.

Perhaps the American people will insist for years on asserting the claim of probate spoliation through some channel or other; but if so, for very decency's sake, it should be limited to the forum having jurisdiction of the settlement. In an age of growing national consciousness these attacks upon the estates of non-residents

are operating powerfully to foreignize all interstate relations, and if there is no principle of law or comity which can terminate these state duplications it may eventually be necessary to ask for a federal probate, one law, one settlement, one jurisdiction, instead of the present multiplicity of masters. More momentous changes have resulted from less conspicuous causes. The federal constitution itself was largely the result of the lack of self-restraint on the part of the states in dealing with interstate commerce, and if the overlapping exactions of the states to-day should result in the loss of one of their chief functions and ultimately in the amalgamation of the states themselves into one consolidated realm this lack of self-restraint would again receive its reward.

The American inheritance taxes have been repeatedly declared by the courts to be no violation of the constitutional provisions against the taking of private property, on the theory, apparently, that it is not the abstract right of property, but only the legal recognition of property, that is protected by the constitution, and that the legal title to all kinds of property is ineradicably contaminated with the claim of the government to despoil the owner by taxation imposed at discretion, and not on account of any public interest in the kind of property. Such a doctrine, however, is in itself the most absolute assertion of a servitude over the owner by denying the right of private ownership by a perpetual title. The confessed and intentional restoration of the feudal tenures, with their burdensome incidents, in an American state which either by statutory or constructive law or its constitution has abolished such tenures, or their casualities, would doubtless, as regards outstanding titles, be obnoxious to the constitutional provisions against taking private property, since it would involve the taking or enlarging of an estate of superiority to support the casualties in derogation of the existing title of the private owner. Yet by the simple device of calling the exaction a tax it seems to be possible to accomplish precisely the same practical result.

These feudal burdens were very real grievances to the early settlers of New England, and accordingly we find among their earliest enactments in the Massachusetts Body of Liberties of 1641 the following provision: "All our lands and heritages shall be free from all fines and licenses upon alienation, and from all heriots, wardships, liveries, primer seisins, year-day-and-waste, escheats, and

forfeitures, upon the deaths of parents or ancestors, be they natural casual, or judicial." By this act the inhabitants of Massachusetts anticipated by nearly twenty years the abolition of the military tenures in England, and by a century the similar abolition in Scotland. On the Hudson River, too, the old feudal manors even in socage tenure caused trouble well into the nineteenth century. The colonists of New England were no fools, however crude or uncouth they may have been in some respects. They did not always express their wants in scientific language, but at least they knew one thing which they did not want, and that was feudal servitude. Yet today in all parts of America many of their successors are eagerly, joyously, exultantly, seeking to restore under other names some of the very oppressions which our predecessors intended to destroy. Appropriate to the present time seems a sentence from Article 26 of the Grand Remonstrance of 1641, when the Long Parliament, referring to land between high and low water mark, complained of "the taking away of men's right under colour of the King's title"; for if men are escaped out of the hands of the feudal barons only to fall into the hands of the implacable organized state, then is democracy merely a multiplex autocracy, and freedom is a word without meaning in the law.

Chapter VIII

PUBLIC AND PRIVATE RIGHTS

In the case of The People *v.* Reardon (184 New York Reports, page 431), the Court of Appeals of New York sustained the constitutionality of a stamp tax imposed by that state for sales of corporate stock. The opinion was rendered by Judge Vann, who therein made the following observations on tax laws: "All taxation is arbitrary, for it compels the citizen to give up a part of his property; it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity or religion, and frequently it is unreasonable, but that does not make it unconstitutional, even if the result is double taxation." . . . "Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the state and federal courts."

If the foregoing words of the learned judge are to be taken merely as setting forth the present condition of the law under the practices of legislatures and the decisions of the courts, his language is only too true and illuminating; but if his words are to be taken as indicating the utter hopelessness of any better basis of public revenue, then they show a terrible hiatus in the scientific justice of our boasted civilization, and may be compared with certain passages from Edmund Burke's feigned argument against all government in civil society in his essay entitled, "A Vindication of Natural Society," as follows:

"All writers on the science of policy are agreed, and they agree with experience, that all governments must frequently infringe the rules of justice to support themselves; that truth must give way to dissimulations, honesty to convenience; and humanity itself to the reigning interest. The whole of this mystery of iniquity is called the reason of state. It is a reason which I own I cannot

penetrate. What sort of a protection is this of the general right, that is maintained by infringing the rights of particulars? What sort of justice is this which is enforced by breaches of its own laws? These paradoxes I leave to be solved by the able heads of legislators and politicians. For my part, I say what a plain man would say on such an occasion. I can never believe that any institution, agreeable to nature, and proper for mankind, could find it necessary, or even expedient, in any case whatsoever, to do what the best and worthiest instincts of mankind warn us to avoid."

The words of Burke were only in pretended argument against established government, in imitation of arguments against established religion, and, therefore, for the purposes of his argument he used the mistakes of government to contend that no government could be "agreeable to nature and proper for mankind." But his words have a hideously vivid application to many of the current practices of taxation, and if we are to believe that some degree of government is "agreeable to nature and proper for mankind," we may equally believe that there must be in natural right some rational basis for the support of government consistently with the natural rights of individual persons, unless we must say that, as government is necessary, therefore, the man exists for the benefit of the organized state or nation rather than the organization for the benefit of the man.

Many will doubtless deny the existence of any natural rights and will be content to look to the organized state as the sufficient source and guaranty of both rights and remedies, but if there are no natural rights, then despotism is merely inexpedient and not unjust. Without in the slightest degree attempting to define the limits of natural rights, the Constitution of the United States of America impliedly recognizes the existence of such a class as natural rights, by specifically prohibiting certain kinds of governmental actions particularly dangerous to human freedom. For instance, one clause declares that "no bill of attainder or *ex post facto* law shall be passed." The first amendment to the constitution says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press," and guarantees the right of assembly; and the fourth amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unrea-

sonable searches and seizures, shall not be violated," and limits the issue of warrants. The ninth amendment says, moreover: "The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Nor is the doctrine of natural rights of merely modern invention. In medieval times, when the law was apparently considered to be co-extensive with justice, there was much discussion of the question whether the people might lawfully, *i. e.*, justly, resist a lawful prince who was violating the rights of his subjects. Obviously, the assumption that the governing prince might be in the act of violating the rights of his subjects implies that some rights have a fundamental basis back of the government itself. Bracton, in his treatise on the laws and customs of England, discusses natural rights. Thus, in Book 1, Chapter 4, he says that "right (ius) is sometimes used for natural right, which is always good and fair; sometimes for civil right only; sometimes for pretorian right only; sometimes for that only which results from a sentence." And, in Chapter 5, he says of private right that it "is collected from three sources, either from natural precepts, or from the precepts of nations, or from civil precepts."

After speaking about public and private right, he considers natural right, the right of nations, and civil right, "which may be called a custom sometimes." Natural right he describes in several ways, first as an impulse (motus) coming from the nature of the living thing, and gives this definition: "Natural right is that which nature, that is, God himself, has taught all animals." Again he considers that "natural right in a second manner is used to express a certain debt which nature represents for each person."

In regard to the right of nations he says: "Likewise, the right of nations is what human nations observe, and which proceeds from natural right." He applies these principles to manumission in the following manner: "But a manumission is the giving of liberty, that is, the declaration of it, according to some, for liberty, which is of natural right, cannot be taken away by the right of nations, although it has been obscured by the right of nations; for natural rights are immutable. But it is truly said, that he, who manumits, gives liberty, yet it is not his own, but another's liberty, for he gives that which he has not, . . . for natural rights are said to be immutable because they cannot be totally abrogated or

taken away, yet something may have been derogated or detracted from them in fact or in part." (Iura autem naturalia dicunter immutabilia quia non possunt ex toto abrogari vel auferri, poterit tamen eis derogari vel detrahi in specie vel in parte.) By which Bracton seems to mean that no violation or infringement of a natural right, by means of national law, can destroy that right or justify the continued violation thereof in the future.

Bracton's description of natural right as an impulse (motus) is not perhaps entirely satisfactory as an exact statement, but it is not necessary here to attempt to give an exact definition or delimitation of natural right. Our common forms of speech seem to recognize its existence. We speak of a "just law," or a "righteous government," whereby we imply that the standard of justice or of right is external to the law or the government. In fact, we may confidently assert the necessity of natural rights until the whole phenomena of human life can be explained by reference solely to the organized state. Bracton's definition of natural right as an impulse suggests, however, that we may look for natural right in the relation between the nature of man and the nature of any particular transaction in which a person may be involved. Justice is the balance between volition and force, and implies a natural right on each side. Every law seeking to restrain the actions of men should contain the three elements, liberty, authority, worthiness, but nothing can be worthy which is unjust. Alexander Hamilton declared that "in framing a government which is to be administered by men over men, the great difficulty lies in this, you must first enable the government to control the governed, and in the next place, *oblige it to control itself.*" In nothing is this more needful than in matters of taxation, on account of the temptation to impose servitudes upon the inhabitants, for a just state is not the proprietor of its inhabitants, but their guardian and protector.[11]

[11]Dr. Rudolf Kobatsch, in his afore-mentioned book, "Internationale Wirtschaftspolitik," at page 156, in considering the right of peaceable foreigners to enter and reside in a country, inquires, "Must the peoples, that is, the individual members of a people, really wait upon the law for the right to reside or establish themselves in another state, until it suits and pleases the states which represent these peoples to unite upon a special settlement treaty? Or, are not all these treaties and the settlement clauses in the commercial treaties rather the halting legalized right, which is preceded by legal usage, customary right, and the elementary necessity of modern international traffic, which has long ago broken the broad road for it?" By which he seems to imply that even in international trade between artificial states there may be natural rights—a point not necessarily material to the present discussion, but interesting nevertheless.

The French Civil Code, in considering servitudes over landed property, speaks of such a servitude in the following manner (Article 639): "It results either from the natural situation of the premises or from the obligations imposed by the law, or from the agreements among the proprietors." (Elle dérive ou de la situation naturelle des lieux, ou des obligations imposées par la loi, ou des conventions entre les propriétaires.) This analysis by the code seems to be not only legislatiye, but also fundamentally comprehensive as touching all possible interests involved, the thing, the state, the individual. Apply these principles to servitude over human beings. Can we say that the natural situation or condition of a man can justly be the foundation for servitude over him? Shall we not rather say that the natural situation or condition of every man always and everywhere demands freedom as the chance to make the best of himself? Shall, then, the law impose a servitude on the man who is of right entitled to freedom? Such a law is mere force, not founded on antecedent right, and is, therefore, unjust. Or, again, shall we say that a man may justly be held to have submitted himself without recall to a condition of servitude to his neighbor or his fellows merely by a fleeting act of temporary consent or agreement? That would be to consider freedom as the mere absence of all restraint at one moment in order to enable a man to sell himself into slavery, and would be the veritable suicide of freedom. When we refuse to permit a man to destroy his future by his reckless acts, we are not depriving him of his freedom, but preserving him for his freedom.

Thus the very same principles which originate and maintain servitudes over landed property as a thing, deny, forbid, and invalidate the assertion or maintenance of servitudes over persons in the contemplation of right and justice, and such servitudes can find no justification, either in the natural situation of man, or in the impositions of the law, or even in the agreements of individuals. Yet it is precisely at this point that current practices of taxation in even the most civilized lands violate the fundamental rights of man in depriving him of the just use of his own life and its incidents by personal taxation on account thereof. The alleged atrocities in the Kongo State in recent years are in many respects only the logical extremes of the personal systems of taxation in vogue in civilized countries. Yet so far is the popular sentiment from recognizing

the essential wrong involved in the present system that there is a widespread desire to make the system more rigorous and drastic in attacking persons for the ownership of personal property, the receipt of income, and the devolution of property at death, so that every one shall be, if possible, subjected to some deprivation. In the ordinary affairs of life it is generally considered the part of wisdom to accomplish a purpose by co-operating with the enlightened self-interest of other parties involved, but in matters of governmental revenue there seems to be an opinion that the government is not fulfilling its duty unless it is making itself painfully felt by every person.

If taxing is merely taking, the operation is necessarily arbitrary, but if we are to regard government as a natural feature of human life, and as having a just place in that life, we must seek its revenues in some basis of public right not involving the establishment of servitudes over persons. The various methods in vogue for taxing persons on account of their personal property, their incomes, or the settlement of the estates of the deceased, consist in asserting servitudes over persons of some classification determined by the state for its own benefit, and are, therefore, unjust. It is not sufficient to say that because the government needs the money, therefore, it may help itself as it pleases to the goods of the inhabitants. That is in the last analysis the argument of the highwayman, the pirate, and the buccaneer. It is no better than asserting a vast public graft, and makes the state merely a great plunderbund. We have passed beyond the time when it is tolerated that the state shall raise its revenue by the arbitrary selection of persons, but we have not passed beyond the time when the state raises its revenue by the arbitrary selection of classes of persons who are to be attacked merely because of their connection with some fact or act to which they are justly entitled as of right.

In order to exclude the assertion of servitudes over persons we must base the public revenue on some public right naturally involved in the subject-matter in respect to which the governmental power is exerted. Thus and thus only can we place it upon a firm and scientific foundation, consistent alike with the natural functions of government and the natural rights of mankind. This public right naturally and justly exists over the landed property in the community, as an artificial segregation dependent for its existence on

the maintenance of stable society. It also exists naturally and justly over those multitudinous special privileges which, in the form of various franchises, are likewise dependent on a social structure. It may also be found in connection with many lines of business, having a natural public interest or function. In all these cases, as heretofore shown, the existence of the public right is consistent with the existence of a private right, and, on the contrary, requires that as the public right when it exists is supreme over the subject-matter, so its enforcement should be over the subject-matter and not over some person or persons interested in the private right. Thus the public servitude of taxation over land can and should be exercised over the land and not over the owner or occupant, unless the latter is actively disturbing the public right; and in like manner the public interest over franchises and businesses having a public nature should be exerted over the enterprise as such, and not over the persons who may have the ultimate benefits of the private interests therein.

These public interests over certain subject-matters constitute in effect a permanent inalienable endowment to which the scientific state can and should look for its revenue without penalizing its inhabitants personally, and as these public rights exist over certain subject-matters by reason of the natural relation of those subject-matters to the state, so, too, they imply that there can be and should be other subject-matters over which the private right is exclusive. As the public right over any particular subject-matter must be either supreme or non-existent, so the private right, whether or not in any particular case subject to a public right, may justly be described as perpetual. Thus the public and the private rights co-exist without conflict. Accordingly, it is not to wealth as the accumulation of the past, but to the sources of wealth in lands, franchises, and public businesses, as the promise of the future, that the state or government should look for its revenue. The private accumulations of the past represent but the residue of the product of the past after the discharge of the public burdens of the past. To attack this private accumulation as such is, therefore, in its aggregate effects on the community, open to the same objections as the expenditure of a man's capital for current expenses, and even more so, for the life of the individual is limited by death, but the community survives. It may be that in the past the distribution of private interests among different classes of private persons has been unfortunate or unjust,

but the logical remedy should be, not to attack indiscriminately the innocent and the guilty of the present, but to undo the past only when specific wrongs can be shown, and to seek to provide for the future a more equitable balance between private persons rather than to deny and invade private rights by the arbitrary act of the state for its own benefit.

But perhaps it may be objected that the limiting of taxation to subject-matters of public interest would violate the doctrine that taxation should be according to ability. If that doctrine means that taxation should be essentially personal and should depend on the mere financial ability of the victim to answer an execution on judgment, it is hereby specifically denied that it is any part of the government's business to attempt to dictate as to the precise person or persons who shall perform the act of paying or that mere financial ability is any material measure of a particular person's economic relation to the state. But if the doctrine means that taxation should be according to economic ability, then it is contended that that would be accomplished by the operation of the natural laws of trade. If the government restricts itself to imposing a tax merely for some public interest involved in a subject-matter or transaction, the private parties interested will adjust among themselves the payment of the tax as their interests may appear to them; and, since the government gets its money, it ought not to interfere. Thus, as between the landlord and the tenant of a piece of land, it should be immaterial to the state whether the tenant pays a gross rental while the landlord pays the tax, or whether the tenant pays a smaller net rental and the tax. Again, take the case of an excise tax for the production of certain goods or a customs' duty for their importation. The justification for imposing such taxes must rest on a public interest as to certain kinds of goods which shall be produced or introduced within a certain country, and such interest relates to the fact or transaction. If the government once gets its charges in a particular case, it is of no just concern to it that the producer or importer may recoup himself by obtaining a higher price. To attempt to make him sell at the same price as if there were no tax would be preëminently unjust.[12]

As to the immateriality of the mere financial ability of par-

[12]Dr. Kobatsch's book on international economic policy contains an illuminating chapter on tariff-tolls and their working.

ticular persons a piece of mortgaged land furnishes an apt illustration. Suppose two persons, brothers perhaps, own together in equal shares a piece of land worth two million dollars. Each will naturally pay half the taxes thereon. One brother is more enterprising than the other, and wishes to develop the land. The first purchases the share of the second, and in payment gives him a mortgage for one million dollars on the whole. The purchasing brother agrees to pay the taxes on the property in full and to pay the seller a certain net interest on the mortgage. No new value has been created. The two brothers are still interested in the same property. The public servitude of taxation over the land is not lessened. Is there any reason for interfering between these parties and requiring an additional tax from either merely because they are now interested in the property by priority rather than equality? The financial ability of each party is the same afterward as before. One millionaire has agreed to carry the tax on the whole property and have all benefits beyond the mortgage and the other millionaire has no tax to pay, but is limited to his mortgage and the interest thereon. Both parties are satisfied and the public interest is not injured. Such a transaction is entirely legal in some jurisdictions without any additional tax, but some jurisdictions require an additional tax either because of the mortgage or the interest therefrom. Now here is a case in which the financial ability of two millionaires has not the slightest relation to the public right involved, and such financial ability is, therefore, in itself no just reason for imposing an additional tax for either the principal or the income of either. The establishment of one such case is enough to defeat the contention that mere financial ability of the person should be the object of attack in taxation.

Nor does the operation of a tax on landed property touch the financial ability of the private owner, when such a piece of property is on an investment basis, for the shrewd purchaser will estimate according to his best judgment the probable amount of the tax on the premises as a part of the expense of carrying the investment and will allow for that tax as for other expenses, like repairs and insurance, so that he will not give more than a price such that the residue of the probable rentals after caring for the expenses will yield him what he considers a fair income for his investment according to the current rate of interest. Thus the purchaser of

landed property on an investment basis has the opportunity for the full market return for his financial ability embarked in the enterprise, and has an economic ability to pay the tax on the property. It is precisely analogous to allowing for an outstanding mortgage on the property. The principle will naturally be the same, whether the tax is estimated by reference to the capital value of the property or the income therefrom, provided the means for collection are reasonably effective. When a piece of landed property is on a speculative basis, the tax may or may not affect the owner's financial ability according to the turn of the market, but on the theory that the tax is justly a prime charge on the land, there is still an economic ability, for the purchase of such speculative land is analogous to the purchase of a piece subject to a mortgage, and the owner pays the tax, as he takes care of the mortgage, for the purpose of protecting his economic interest in the property.

Now, in the case of personal property, and personal incomes, there seems good reason to believe that the same investment principle will operate so far as conditions are similar, that is, when the situation is such that the government has some hold on the property itself or on the source of the income before it comes into the hands of the investor; and in such cases the investor will estimate his price according to the probable return which will come to him. This situation may most easily arise in the case of certain kinds of representative securities, as, for instance, when the government collects a tax from the debtor and authorizes him to deduct it from the payments to the security holder, or when the security, like a mortgage, is a matter of public record and controlled by the government's tax officials. If such a situation is created effectively the investor will naturally make allowance for the nominal payments which he never gets or which he certainly must pay over for the tax, and will lower the price which he will give for the investment, or raise the nominal interest charged to a level where the actual return to him will seem to be a fair return at market rates. Thus the financial ability of the investor is again untouched and the debtor, in order to raise a certain capital, must either lower the price of his securities or raise the nominal income to offset the probable tax; which is thus in effect shifted, so that so far as a personal property tax or a personal income tax is really effective for revenue purposes at the source, it at once defeats itself, and its

purpose to attack the financial ability of the investor is discounted by him and the real burden thrown over on the other party by the arbitrary intervention of the government irrespective of any public right involved.

But very many classes of personal property and incomes are of such a character as to be physically out of reach of the government, which can, therefore, only attempt to discover the private owner or recipient and hold him liable. In such cases the tax is obviously not literally "on" the property or the income, but on the person who may be discovered and charged. In any particular case there is thus a chance that the facts may not be discovered and those persons who think that they can successfully conceal the facts may be willing to give considerably more for an investment security than would clearly be a sufficient price if the tax were certain of collection. A comparison of current prices for taxable and non-taxable securities of the same general class does not always show such a divergence as would be naturally expected from a consideration of the tax theoretically in force, but the different laws of different jurisdictions frequently make a market for a security as non-taxable in one state although taxable in others.

When a particular investment is of the taxable class in a particular jurisdiction, although the chance of discovery may be small in the aggregate, yet in the particular case where the tax is enforced it falls as a distinct injury on the holder of an investment whose price may be figured in the market on the expectation that a tax will seldom be collectible. In such a case the tax is an actual encroachment on the financial ability of the owner, but without any economic ability to justify it. The tax, then, in the particular case is not according to ability, either financially or economically, for in the particular case it falls fortuitously on some person who for some reason has not been able to maintain the secrecy which is assumed in the market price to be possible to a considerable proportion of investors. Obviously the same principles will tend to operate whether the tax is large or small, and whether figured in reference to the capital or the income, if the collection of the tax for such securities depends on discovering the private person's dealings. Thus those can best afford to hold such an investment who are the most skilful in evasion, and one of the prominent effects of these taxes for personal property and income is to put a premium on

such skill and exclude certain classes of legitimate investments from the more scrupulous portion of the population except upon a penalty for their scrupulousness.

The difficulty of discovering certain large classes of personal property is one of the motives urged for imposing the inheritance taxes which just now seem so popular. Aside from the mathematical error in attacking estates indiscriminately, whether or not invested in property of a kind that is likely to escape the taxes which legally accrue in the life of the owner, it is obvious that, so far as any particular taxes are fundamentally unjust, the difficulty of collecting them generally should be a reason for abandoning them and not for continuing the injustice and supplementing it by further injustice of the same general kind. These inheritance taxes are even less according to economic ability than taxes for personal property and income, for they are purely fortuitous personal casualties without any general basis upon which even an approximate allowance may be made in the market price as a partial buffer to the investor's estate. Nor do they fall according to any general financial ability. They attack and deplete the financial ability of the estate or the beneficiary in a purely arbitrary manner, not having any relation even in theory to the general financial ability of persons in the community, except as the mere possession of resources implies the chance or physical ability to lose them in whole or in part. A distinct loss externally imposed for an unpreventable but totally uncertain event can hardly be said to rest on ability either economic or financial. The fundamental thought in imposing a tax on lands, franchises, or a business with a public character, is that by reason of a public servitude or interest in or over the subject-matter the state or government has a right to a voice or claim in the management, benefit, or product of that subject-matter. The fundamental thought in imposing a tax for personal property, income, or the estates of the deceased, seems to be that the property or benefit belongs to private persons and may, therefore, be taken away from them by the state. This is essentially the denial of the private right, the assertion of a proprietary claim over the persons affected, and results in the establishment of servitudes over such persons.

The theory on which these personal taxes rest does not apply merely to any one class in the community. It is not a method of simply offsetting the faults of the vicious rich. Even if a line can be

drawn beyond which the mere size of a fortune rather than the use or misuse of it can be said to be objectionable, these taxes are not merely applicable in theory to such cases of excess. The theory of them applies to every class in the community, and it is only by the mercy of the legislature or the excessive cost of collection that to some extent poorer persons are frequently exempted from their rigor. If they should be enforced literally against all classes, we should find ourselves under a bureaucracy comparable to that of Russia and a surveillance resembling that of Germany.

Behold the condition of the thrifty, industrious citizen when these taxes are in full force. He buys or hires a piece of land for the use of his business; and either directly, as owner to protect his title, or indirectly, through his rental to the landlord, he pays the tax for the public interest in the land during his occupation. He uses the land and his own skill to produce products, and has a surplus left after supplying his needs. This surplus product he lays aside for the future, and the next year the state comes, in the guise of its officials, who have discovered the surplus, and says: "Give me so much from your surplus, for I need it in my business." But, says the owner, "I produced this myself and paid you for your public interest in the land on which I produced it. This is mine to keep for myself." "No," says the state, "because you have it, therefore, a part must be taken away from you. If you had been less industrious or more extravagant you would have the benefit of all your product, but now you must surrender part for your prudence."

Perhaps he has exchanged part of his surplus product for the goods of others, and again the story is the same. The man says it is his because it is the compensation for his product. The state says he must surrender part merely because he "has" it. Or, again, perhaps he has exchanged his product for gold, silver, or other ready medium of exchange, and has in turn put out the compensation as a loan for a fixed compensation. Again the state comes in, if its officials discover the fact, and demands a payment because the man has saved something, for there is nothing like the sight of ready money in private hands to excite the cupidity of the taxing legislature. So, although the man has limited his compensation to a fixed amount for postponing the use of his surplus, yet he is not to be allowed to keep all of that, but must be taxed, either because he has money at interest or has received interest from money loaned.

Again, perhaps he has invested his surplus in a legitimate enterprise in another country, and the fact becomes known to the officials at his home, who at once make demand upon him. The man replies, "All claims against the enterprise in which I am interested either have been or will be paid by that enterprise in the country where it is situated. This is a matter beyond your just jurisdiction." But the state says, "I will not allow my subjects to have the benefit of property in other jurisdictions," and so the man again must pay at home for the ownership of his goods in another country, or for holding stock in a foreign corporation or company, or because he has received the income which gives value to such foreign holdings.

Perhaps the man is not blessed or encumbered with possessions, but is active, skilful and energetic, and for his own labor and skill receives large compensation periodically. Again the state comes and says, "Pay me for the income which you have earned, and the man replies, "If I have earned it, does it not belong to me?" The state says, "Yes, it belongs to you, but I will not let my subjects work for themselves unless they also work for me as much as I choose to say." If, after all these assaults upon him for his property, his earnings, or his savings, there is anything beyond a pittance left at the time of his death, the settlement of his estate must be obstructed, if present voices shall have their way in all states, and as a matter of fact actually is obstructed in many states until the brooding, watchful, envious government, or perhaps two or three governments, national and local, shall have taken so much as the legislature by its own choice may have determined, and only the remnant can go to the dependent family or the friends to whom the deceased wished to show his friendship.

Thus the peaceable, industrious citizen may go through life penalized for his possessions and prosperity, with the confident assurance that at his death his family or dependents will be more or less despoiled. Verily, to adopt the words used by Blackstone in reference to the feudal tenures: "A slavery so complicated, and so extensive, calls aloud for a remedy in a nation that boasts of her freedom." Yet, instead of remedy, the cry in many quarters is to make the law more severe against private persons, while the public interests in the lands of the country are partially neglected, and vast franchises are exploited by special parties, and the governments of state and nation rely on vexatious and inquisitorial taxes which are

unkind, unsound, and unjust, and are, moreover, needless if there is any just basis for public and private rights.

Perhaps it may be objected that hardships may result under any method of government revenue, as, for instance, by an excise or import tax for some product of great consequence to the community. This is undoubtedly true, but unless we are to condemn all excises and tariffs utterly, which is not at all intended herein, such hardship is an injury to the community generally and not to particular persons by violating their private rights, for such a hardship consists merely in an increase of the price of goods in the market, but no private person can be said to have a vested right to buy goods at any particular price. Otherwise it would be the duty of the state to fix the prices of articles in the market. The whole teaching of history shows the uselessness of that policy.

The fundamental argument, however, of this whole discussion is not the mere hardship in special cases. The wrong consists in the invasion of personality in violation of the rights of mankind. Why is it that men love liberty in the abstract, and fear freedom in fact? Is it not because they are too prone to take pride in association with some artificial institution or combination of men, as the army, the navy, the aristocracy, the state, the nation, rather than in their own personality as human beings? There is no better touchstone of natural rights than the ancient precept of the Golden Rule, which may be transposed into juristic language by saying: refrain from doing that which, if done to you, you would regard as unjust. This should apply to the actions of aggregations of men in their collective capacity towards a person as well as to the actions of one man to another.

Herbert Spencer seems to have expressed this thought. In discussing the difference between the relation of a physical organism to its constituent organs and the relation of a social organism to its members he uses the following language: "The last and perhaps the most important distinction is that while in the body of an animal only a special tissue is endowed with feeling, in society all the members are endowed with feeling. . . . It is well that the lives of all parts of an animal should be merged in the life of the whole, because the whole has a corporate consciousness capable of happiness or misery. But it is not so with a society, since its living units do not and cannot lose individual consciousness, and

since the community, as a whole, has no corporate consciousness. And this is the everlasting reason why the welfare of citizens cannot rightly be sacrificed to some supposed benefit of the state, but why, on the other hand, the state is to be maintained for the benefit of citizens. The corporate life must here be subservient to the lives of the parts, instead of the lives of the parts being subservient to the corporate life."

The same general thought seems to be suggested in an opinion by Mr. Justice Bradley, for the Supreme Court of the United States, in the case of Boyd *v.* United States (116 U. S. Reports, page 616, at page 630). The case deals with the question of unreasonable searches and seizures under the fourth amendment to the American Constitution, and, although not directly in point, has a suggestive bearing on inquisitorial methods of taxation. Mr. Justice Bradley discusses at length the opinion of Lord Camden in 1765, in the case of Entick *v.* Carrington (19 Howell's State Trials, page 1029), in regard to searches and seizures under the English law, and expresses his own views as follows: "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offense, but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers, to be used as evidence to convict him of a crime or to forfeit his goods, is within the condemnation of that judgment." And later, in the same opinion, Mr. Justice Bradley says that "any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of a crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to

the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

Dr. George A. Gordon, pastor of the Old South Church in Boston, has expressed a similar idea in the chapter on "Humanity," in his book, "Ultimate Conceptions of Faith." At page 199 he speaks as follows: "Among the permanent guardians of humanity, there stands first man's own nature, his personality. The admission of human personality is eventually the trumpet of doom to slavery, serfdom and caste. Kant's famous dictum that personality implies that man is an end to himself, and that he should never become means either to another's purposes or to his own inclinations, is an availing protest. Use things, but use them wisely; use animals, but use them kindly; use men never; that is the edict from the throne of moral personality. Under the historic expression of moral personality, family exclusiveness, social snobbery, governmental injustice, and religious narrowness have slowly yielded. The increasing pressure of manhood has been availing. The wider realization of personality among the masses of men through education of the intellect and the will is already effecting enormous changes in the social order. As he rises in intelligence and character man must continue to count for more; and as society is affected with the sense of human personality its consideration for the unfortunate must become deeper and more practical. Social groups have been formed upon social distinctions; and so long as these are not exclusive they are legitimate enough. But the admission that man is man, the increasing consciousness of personality that has forced this admission calls for the wider recognition of what is common in the race. When moral worth is the great title to consideration, and the capacity for it the distinctive mark of man, a force is liberated that will finally inaugurate the reign of human brotherhood. Meanwhile practical Christianity goes about building up moral personality. Ancient tyrannies would have been impossible but for the absence of manhood among the people. When Diogenes said that he had never seen a man he uncovered the whole opportunity of secular barbarity, social exclusiveness, political injustice, and religious quackery. Men's ideas of the race will be very different when over great circles of population they compel respect for one another. A whole world of bad social ethics, and worse social practice, and

equally reprehensible theology, would utterly vanish, if suddenly men were to face one another in the fullness and strength of a great moral experience. The first witness that the true social ultimate is mankind is the worth and inviolableness of human personality."

This, then, is the philosophy, the law, the doctrine, of humanity, that mankind is of right entitled to the ownership of his own life and the benefits of the incidents thereof, and to freedom therein, not as the absence of all restraint, but as the chance to make the best of himself; and this, too, not merely as against his fellows in their individual capacity, but even more against them in their collective capacity as an organized state, for the evil intentions of a private man may often be averted by appeals to his better nature, but when a government deliberately sets out to inflict wrongs, it is well nigh relentless. Our forefathers of the eighteenth century proclaimed that "taxation without representation is tyranny," on the theory that representation implied consent, but they assumed that those could be justly charged with consent who were powerless to dissent. Our fathers of the nineteenth century determined that private property in human flesh was an intolerable idea, but they were appalled only at slavery between private persons. It is perhaps for the twentieth century to declare that personal taxation is an injustice, as involving the assertion of servitude over persons which no consent can justly validate. Since the dawn of intellectual freedom in the renaissance of the fifteenth century, each century succeeding has witnessed some struggle toward some phase of freedom, religious, civil, political, national. The signs are not lacking that the twentieth century may witness the seeking and striving for industrial freedom. Toward that end no more vital or important step can be taken than the abrogation of personal taxation, not for the purpose of promoting the grasping greed of acquisition and retention, but with a profound sense of the dignity of humanity and the sanctity of human personality.